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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1987

JAMES P. JOYCE, JR.,
Appellant,

vs.

LEWIS BOLT & NUT COMPANY,
SELF INSURED,
and
LEWIS BOLT & NUT COMPANY AND
GREAT AMERICAN INSURANCE COMPANY,
and
HMO MINNESOTA, and
NORTH AMERICAN LIFE ASSURANCE COMPANY
and
THE SPECIAL COMPENSATION FUND,
Appellees.

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

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Date: December 17, 1987

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QUESTION PRESENTED

Where two individuals suffer an identical series of work-related injuries in 1981, 1982, and 1983, except that one sustains an additional and aggravating injury in 1984, is it arbitrary and irrational, and thus unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, for the state statutory scheme to treat less favorably the individual with the additional injury?

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In The

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JAMES P. JOYCE, JR.,
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LEWIS BOLT & NUT COMPANY,
SELF INSURED,
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HMO MINNESOTA, and
NORTH AMERICAN LIFE ASSURANCE COMPANY
and
THE SPECIAL COMPENSATION FUND,
Appellees.

On Appeal from the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

James P. Joyce, the appellant, appeals from the final judgment of the Supreme Court of Minnesota, dated September 18, 1987, holding that the Workers' Compensation Act in effect on the date of a new and separate injury supersedes the law in effect at the time of the employee's earlier injuries; that any right to compensation under previous law was contingent on temporary total disability; that vesting does not occur until the causal relationship between disability and work-related injury is proved.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota, which appears in the appendix, page B-1, *infra,* is reported at 412 N.W.2d 304 (1987).

The decision of the Minnesota Workers' Compensation Court of Appeals, which appears in the appendix, page C-1, *infra,* is reported at 39 W.C.D. 148 (1986).

The Findings and Order of the Compensation Judge, Office of Administrative Hearings, Workers' Compensation Section, dated September 30, 1985, is not reported. It is reprinted in the appendix, page D-1, *infra.*

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on September 18, 1987. *See* page B-1, *infra.*

A notice of appeal to this court was timely filed in the Supreme Court of Minnesota on November 9, 1987.

This appeal is being docketed in this Court within 90 days from the final decision of the Supreme Court of Minnesota. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const. amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § *176.101 (1984):* set forth in appendix, page E-1, *infra.*

Minn. Stat. § *176.101, subds. 1, 2 (1983):* set forth in appendix, page F-1, *infra.*

Minn. Stat. § *176.101. subds. 1, 2 (1981-82):* set forth in appendix, page G-1, *infra.*

HOW THE FEDERAL QUESTION WAS RAISED

The federal question arose for the first time when the Minnesota Supreme Court rendered a unanimous decision which contained an unexpected interpretation of the Minnesota Workers' Compensation Act of 1984. This interpretation of the state statute conflicts with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and threatens rights guaranteed by that amendment. Prior to that decision, the Minnesota Workers' Compensation Act of 1984 had not been construed so as to raise any question about its constitutionality. The ruling of the state supreme court could not have been anticipated by the appellant.[1]

[1]The general jurisdiction rule is that the federal question must be raised, presented, and pursued in a timely manner in the state court proceedings. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962). This rule, however, does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right." *Great Northern Railway Company v. Sunburst Oil & Refining Company,* 287 U.S. 358, 367 (1932) (citations omitted); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 86 (1980).

Further, there is no requirement that a petition for rehearing be filed if the constitutional question arises from the decision of the state's highest court. This Court has reviewed several cases in which no petition for rehearing had been filed. *Local 174, Teamsters, Chauffers, Warehousemen & Helpers of America v. Lucas Flour Company,* 369 U.S. 95, 101 n.8 (1962). The full Minnesota Supreme Court rendered, as did the Washington Supreme Court in *Local 174,* a unanimous decision, and there is "no indication that the decision ... was other than the final word of the State's final court." *Id.* at 101.

STATEMENT OF THE CASE

The appellant, James P. Joyce, Jr., suffered a series of six work-related injuries. Five of the injuries occurred prior to January 30, 1984, under the "old" Minnesota Workers' Compensation Act. The sixth injury occurred on June 15, 1984. As a result of these injuries, Mr. Joyce was temporarily, totaliy disabled. Mr. Joyce timely filed a claim petition alleging the six injuries and seeking workers' compensation benefits.

The Compensation Judge found, inter alia, that Mr. Joyce's temporary total disability after June 15, 1984, was substantially greater as a result of the pre-existing impairments from the first five injuries than it would have been from the injury of June 15, 1984, alone. The judge found that Mr. Joyce reached maximum medical improvement on January 31, 1985, and was therefore entitled to temporary total compensation from June 15, 1984, to May 1, 1985, 90 days after maximum medical improvement.

The Workers' Compensation Court of Appeals reversed the Compensation Judge's ruling regarding temporary total compensation. Relying on the Compensation Judge's finding that each injury contributed to the substantially greater disability after the 1984 injury, the court held that the 1984 Workers' Compensation Act could not limit the vested rights to compensation established by the law in effect on the injury dates prior to 1984. While benefits for the 1984 injury would be governed by the 1984 Workers' Compensation Act, that legislation has no effect on benefits to which Mr. Joyce had a vested interest. The court ordered temporary total compensation from and after June 15, 1984.

The Minnesota Supreme Court reversed the Workers' Compensation Court of Appeals. It held that the date of injury determines which law applies, thus suggesting that the pre-1984 injuries would be governed by pre-1984 law. Solely because Mr. Joyce suffered a further aggravating injury *after* the effective date of the 1984 statute, however, the court held that all of his injuries would be governed by the 1984 Workers' Compensation

Act. It denied that such a ruling deprived Mr. Joyce of any vested rights, holding that the right to compensation for the pre-1984 injuries does not vest until the causal relationship between the disability and work-related injuries is proved.

Thus the Minnesota Supreme Court's ruling reasonably serves to safeguard the rights of workers injured before 1984 to the expansive remedies of the pre-1984 statute. It also reasonably holds that workers injured only after the enactment of the 1984 statute are subject to the 1984 Act. However, in defiance of all reason and fairness, the court's ruling serves to deprive a worker injured both before and after the effective date of the 1984 statute of all rights he would have had had he not suffered the final debilitating injury.

THE QUESTION IS SUBSTANTIAL

The question as to the Fourteenth Amendment implication of penalizing workers who suffer a series of work-related injuries is substantial for the following reasons.

The result of the Minnesota Supreme Court's decision is that Equal Protection of the law is denied workers injured both before and after the effective date of the 1984 Minnesota Workers' Compensation Act. If employee A was injured prior to 1984, he would receive benefits as set out in the compensation laws in effect on the date of each of his injuries. If he was injured in 1981 or 1982, for example, he would be entitled to ongoing temporary total benefits indefinitely. Minn. Stat. § 176.101 (1981-82), p. G-1, *infra.* If employee B was injured prior to 1984 and again in 1984, he would be divested of his rights under pre-1984 statutes. He would fall under the 1984 Minnesota Workers' Compensation Act, which terminates temporary total benefits 90 days after maximum medical improvement. Minn. Stat. § 176.101, Subd. 3e (1984), p. E-3-4, *infra.* If appellant had only been injured the first five times, all pre-1984 injuries, he would have been entitled to benefits as prescribed by the law in effect on the date of each of the five injuries. For the sole reason that appellant was injured a sixth time, in June 1984, the Minnesota Supreme Court divested him of his entitlement to benefits as set out in the pre-1984 workers' compensation laws, and subjected him to the 1984 statute alone. This unequal distribution of state benefits is subject to scrunity. *Zobel v. Williams,* 457 U.S. 55, 60 (1982).

Scrutiny of unequal benefits usually involves the legislation that created the benefits. *See City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 440 (1985); *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166 (1980). In the instant case, however, the legislative act in not challenged. Instead, appellant challenges the creation of "new legislation" by the Minnesota Supreme Court that unconstitutionally destroys rights vested in the injured worker.

There is no question that the Minnesota Workers' Compensation Act, as it has changed through the years, provides different treatment for workers injured in different years under different statutory schemes. But it is a basic tenet that the rights of an employee are fixed at the time of his accident. *Schwartz v. Talmo,* 295 Minn. 356,____, 205 N.W.2d 318, 321 (1973). It is also a well-settled principle that workers' compensation rights are contractual in nature. *Yeager v. Delano Granite Works,* 250 Minn. 303, ____, 84 N.W.2d 363, 366 (1957). For these reasons, "any statute which purports to alter a substantial term of the contract which was in effect at the time the controlling event occurred . . . impairs the obligation of such contract and is therefore unconstitutional." *Id.* The Minnesota Supreme Court gave no indication that it intended to overrule *Schwartz, Yeager,* or other cases that followed. Therefore, the court's decision stands as an alteration of the contract between employer and employee, a result which is impermissible, and which denies Equal Protection to the appellant.

The question is also substantial because it involves the right to work and the desirability of a strong work force. A job, while not a "fundamental right", is nevertheless important in maintaining the strength of our economy, the health of our industries, and the well-being of our citizens. This Court has found that denying illegal alien children an education violates the Equal Protection Clause of the Fourteenth Amendment. *Plyer v. Doe,* 457 U.S. 202 (1982). The Court's concern that illiterates would add "to the problems and costs of unemployment, welfare, and crime," *id.,* at 230, is applicable to the case at bar, as well. Handicapped workers without the temporary total benefits to which they are entitled, also add to the problems and costs of society.

All 50 states have affirmed that when an injury arising out of and in the course of employment forces a worker to withdraw from the job market, industry must bear the cost. The Minnesota Supreme Court, however, has taken an alarming step toward abrogating this policy and shifting the burden to the

public welfare system. The court's decision has arbitrarily divested employees injured before and after the enactment of the 1984 Workers' Compensation Act of their right to compensation as per the law in effect on the date of each injury. Industry has thus been relieved of liability for pre-1984 injuries.

The decision of the Minnesota Supreme Court is patently arbitrary and irrational. This Court focused on whether "Congress achieved its purpose in a patently arbitrary or irrational way" in *Fritz*, 449 U.S. at 177. The scheme challenged there was not arbitrary, according to Justice Rehnquist, because it was "an attempt to protect the relative equities of employee[s] . . . " *Id.* The Minnesota court's interpretation makes no attempt to protect relative equities. In fact, the court succeeds in reversing the equities by treating more favorably the less frequently injured employee.

This is not a case where a "small monthly comfort benefit" is being denied. *Schweiker v. Wilson*, 450 U.S. 221, 231 (1981). Nor is it a case where a worker would be entitled to a "windfall benefit." *Fritz*, 449 U.S. at 169-70, n.3. It is a case where workers who suffer multiple injuries in the course of their employment are divested of their entitlement to benefits crucial to their survival. Thus, handicapped workers are forced to turn to welfare in order to feed their families and keep their homes. What governmental interest could possibly be served by placing more people on the already overburdened welfare system?

The Minnesota Supreme Court has imposed a severe penalty on appellant simply because he suffered work-related injuries both before and after the enactment of the 1984 Minnesota Workers' Compensation Act. The absence of any discernable interest in doing so only adds substantially to the Fourteenth Amendment claim.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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State of Minnesota

In Supreme Court

C1-86-2109

James P. Joyce, Jr.,
Respondent,
vs.
Lewis Bolt & Nut Company,
self-insured,
Respondent,
Lewis Bolt & Nut Company,
and Great American
Insurance Company,
Relator,

HMO Minnesota, et al,
Intervenors,

TO: CLERK OF THE SUPREME COURT OF THE UNITED STATES

I, Beverly J. Dease, Deputy Clerk of the Supreme Court of the State of Minnesota, do hereby certify that on the 9th day of November, 1987, the original Notice of Appeal to the Supreme Court of the United States was received and filed in the Office of the Minnesota Supreme Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at St. Paul, Minnesota, this 10th day of November, 1987.

/s/ Beverly J. Dease

Beverly J. Dease, Deputy Clerk
Minnesota Supreme Court

A-2

In the Supreme Court of the State of Minnesota
No. C1-86-2109

OFFICE OF APPELLATE COURTS
NOV 9 1987
FILED

James P. Joyce, Jr., Appellant,

v.

Lewis Bolt & Nut Company, self-insured,
and
Lewis Bolt & Nut Company and
Great American Insurance Company,
and
HMO Minnesota, et al.,
and
Special Compensation Fund, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James P. Joyce, Jr., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota, entered in this action on September 18, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ John J. Horvei

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November 5, 1987

State of Minnesota, Supreme Court
I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 10th day of November 1987.
/s/ Beverly J. Dease
Deputy Clerk

State of Minnesota

In Supreme Court

C1-86-2109

Workers' Compensation Court of Appeals **Coyne, J.**

James P. Joyce, Jr.,
Respondent,

vs.

Lewis Bolt & Nut Company,
self-insured,
Respondent,

Filed September 18, 1987
Office of Appellate Courts

Lewis Bolt & Nut Company,
and Great American
Insurance Company,
Relators,

HMO Minnesota, et al.,
Intervenors,

The Special Compensation
Fund,
Respondent.

SYLLABUS

Workers' Compensation Act in effect on date of new, separate injury supersedes the law in effect at the time of employee's earlier injuries. Any right to compensation under previous law was merely contingent on temporary total disability; vesting does not occur until the causal relationship between disability and work-related injuries is proved.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

COYNE, Justice.

We review on certiorari a decision of the Workers' Compensation Court of Appeals awarding compensation for six separate injuries to the back. We affirm the award with respect to the five injuries occurring prior to December 31, 1983, and we affirm the determination that the employee is entitled to economic recovery benefits in a yet undetermined amount for the permanent partial disability attributable to the sixth injury on June 15, 1984. We reverse the award of ongoing temporary total disability compensation from June 15, 1984, and reinstate the decision of the compensation judge limiting temporary total disability compensation to the period ending 90 days after employee reached maximum medical improvement.

The employee worked for Lewis Bolt & Nut Company, primarily as a heaterman or headerman -- both heavy duty jobs -- from May 21, 1974 to June 15, 1984, when he sustained the last of several work-related back injuries. Although he had undergone laminectomies on September 8, 1981 and on December 29, 1983, employee did not seek workers' compensation until after the injury of June 15, 1984.

The compensation judge found the following facts: The employee had sustained four personal injuries of the Gillette type arising out of and in the course of his employment to August 23, 1981, March 6, 1983, May 17, 1983, and October 16, 1983. The injuries of August 23, 1981 and October 16, 1983, each resulted in a 15% permanent partial disability of the back. In addition, the employee suffered two specific personal injuries to the back: one on May 24, 1982, and the last injury on June 15, 1984. The employee was temporarily totally disabled from June 15, 1984 to January 31, 1985, when he reached maximum medical improvement (MMI). The injury of June 15, 1984, is a substantial contributing cause of employee's temporary total disability, which is the combined result of all six injuries; and employee's disability from June 15, 1984, to MMI was substan-

tially greater as a result of his preexisting impairments than would have resulted from the 1984 injury alone.

The compensation judge found that employee had sustained a permanent aggravation of the back as a result of the June 15, 1984 injury, but he made no permanency rating because the employee had not claimed permanent disability attributable to that injury. On February 1, 1985, the employee suffered a further aggravation of the back in a non-work-related automobile accident. On February 28, 1985, the employee had a third laminectomy. As of the date of the hearing, employee had not returned to work; the employer had made no offer of work.

On the basis of these findings the compensation judge ordered the employer, which was self-insured until January 1, 1984, to pay temporary total disability compensation related to each of the first five injuries and permanent partial disability compensation related to the 1981 and 1983 injuries -- all calculated according to the law in effect on the date of the particular injury. Finally, he awarded temporary total disability compensation from June 15, 1984 to May 1, 1985 (90 days after MMI on January 31, 1985) and economic recovery benefits in whatever amount the employee may be entitled based on permanent impairment of the body as a whole as a result of the June 15, 1984 injury.

Having found that the injury sustained on June 15, 1984 had been duly registered with the department of labor and industry, the compensation judge ordered the self-insured employer dismissed on payment of the compensation awarded with respect to the five injuries which had occurred prior to 1984 and ordered Great American Insurance Company, which insured employer from January 1, 1984, to pay the award related to the 1984 injury, with a right of reimbursement pursuant to Minn. Stat. § 176.131 (1986), from the special compensation fund.

On appeal the WCCA unanimously agreed that there was substantial evidence for all of the compensation judge's factual determinations and that they must be affirmed. The WCCA divided, however, with respect to the application of the law to those facts. While all agreed on the correctness of the award of

benefits for the temporary total disability following each of the first five injuries and for permanent partial disability attributable to the injuries of August 23, 1981, and October 16, 1983, they disagreed about the legal implications of the 1984 injury. The majority was of the opinion that following the 1984 injury the employee had a vested right under the pre-1984 workers' compensation act to ongoing temporary total disability compensation to which maximum medical improvement and the limitation on temporary total compensation provided by the 1983 revisions of the workers' compensation act are inapplicable. The majority awarded temporary total disability compensation from June 15, 1984 and also economic recovery benefits, to be paid by Great American, the insurer at the time of the 1984 injury. The dissenting judge would have affirmed the compensation judge's award of benefits limiting temporary total disability compensation to 90 days after MMI.

At the outset we note the employer's objections to the determination that the employee's 1981 injury is compensable and that the employer's attempt to register the 1983 injuries was untimely. We are satisfied, however, that the findings of the compensation judge, which the WCCA affirmed, are not manifestly contrary to the evidence; indeed, from our review of the record we conclude, as did the WCCA, that all of the compensation judge's findings are supported by substantial evidence. *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54 (Minn. 1984); *Egeland v. City of Minneapolis*, 344 N.W.2d 597 (Minn. 1984).

The critical issue presented here is fundamental to the law of workers' compensation: the effect of amendment of the Workers' Compensation Act when a worker injured prior to the amendment sustains another injury after the amendment. The issue arises because the 1983 revision of the Workers' Compensation Act sharply curtailed temporary total compensation. Laws 1983, ch. 290, § 42-68. The employee contends, and by majority opinion the WCCA agreed, that an employee injured prior to January 1, 1984 has a vested right under the "old" Workers' Compensation Act to collect temporary total dis-

ability benefits for the rest of his life and that this vested right may not be impaired by the "new" law -- i.e., the Workers' Compensation Act as revised by Laws 1983, ch. 290 -- in effect on June 15, 1984 when employee suffered his most recent injury. The WCCA's award, however, is for economic recovery benefits provided by the "new" law and temporary total disability benefits available only under the "old" law but calculated on the basis of employee's wages on June 15, 1984. It seems to us that neither the employee nor the WCCA can straddle the demarcation line between the "old" and "new" laws and keep a foot in each camp.

Strictly speaking, the rights and liabilities created by the Workers' Compensation Act are imposed on the employment relationship pursuant to the police power, independently of any actual or implied contract. *Todeva v. Oliver Iron Mining Co.*, 232 Minn. 422, 428, 45 N.W.2d 782, 788 (1951). On the theory, however, that the statute becomes a part of the contract of employment, *Sandy v. Walter Butler Shipbuilders, Inc.*, 221 Minn. 215, 218, 21 N.W.2d 612, 614 (1946), we have treated the Workers' Compensation Act as contractual in nature, and we have consistently held that "any statute which purports to alter a substantial term of the contract which was in effect at the time the controlling event occurred★ ★ ★ impairs the obligation of such contract and is therefore unconstitutional." *Yaeger v. Delano Granite Works*, 250 Minn. 303, 308, 84 N.W.2d 363, 366 (1957); *Warner v. Zaiser*, 184 Minn. 598, 239 N.W. 761 (1931). It is, then, a basic tenet of workers' compensation law that the substantive rights of employer and employee are fixed, not by their agreement, but rather by the law in effect on the date of the controlling event. Although death is the event which controls the rights of dependents, *e.g., Lakics v. Lane Bryant Dep't Store*, 263 N.W.2d 608 (Minn. 1978); and although the controlling event with respect to an occupational disease is the manifestation of its disabling effect, *e.g., Langlais v. Superior Plating, Inc.*, 303 Minn. 213, 226 N.W.2d 891 (1975), most often the occurrence of a compensable personal injury is the controlling event.

Moreover, it is the most recent occurrence of a compensable personal injury which is the controlling event, and the law then in effect governs the employee's rights with respect to the claim arising out of that injury. If a period of disability is precipitated by a "consequential" injury, a recurrence, or a mere temporary aggravation, which is simply a continuance of an earlier injury, as opposed to a new, separate injury, the original injury continues to be the controlling event, and the employee's rights are governed by the Workers' Compensation Act in effect on the date of the original injury. *E.g., Rohr v. Knutson Construction Co.*, 232 N.W.2d 233, 236 (Minn. 1975). If, on the other hand, the employee suffers a new, separate injury, that new injury supersedes the earlier injury as the controlling event, and the law in effect on the date of the new injury supersedes the law in effect at the time of the earlier injury. As Professor Larson puts it, "The legal rule is, of course, that if it is a separate new injury the rate in effect at the time of the new injury controls." 2 Larson, Workmen's Compensation § 60.50. *See, e.g., Boltz v. Armour Agricultural Chemical Co.*, 269 Minn. 482, 486, 131 N.W.2d 624, 628 (1964); *Marsolek v. Miller Waste Mills*, 244 Minn. 55, 60, 69 N.W.2d 617, 620 (1955).

Here employee claimed that he had sustained six separate work-related injuries, the last of which occurred on June 15, 1984. The compensation judge and the WCCA found as fact that employee had indeed sustained six separate injuries, that all of the injuries were substantial causes of his total disability following the 1984 injury, and that three of those injuries, including the 1984 injury, had resulted in permanent partial disability. Although employee does not dispute the finding that he suffered a separate, new injury in 1984, he contends that to invoke the statute in effect on June 15, 1984, is to destroy rights vested under the "old" statute applicable to the earlier injuries. The employee has, however, misconstrued the nature of the rights which vested under the "old" act. While it is true that employee had a right after the work-related injury of October 16, 1983, to benefits during temporary total disability substantially caused by his October 1983 injury and any earlier work-

related injuries, that right was contingent on employee being temporarily totally disabled and did not vest until the causal relationship between his disability and the prior work-related injuries had been proved.

> When a right has arisen upon a contract, or transaction in the nature of a contract, authorized by statute[,] and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it, it becomes vested and the repeal of the statute does not affect it or the action for its enforcement.

Yaeger v. Delano Granite Works, 250 Minn. 303, 307, 84 N.W.2d 363, 366 (1957). The employee had, however, returned to work after the October 1983 injury, and until the injury of June 15, 1984, employee was not totally disabled. On the occurrence of that separate new injury the rights available under the statute in effect on June 15, 1984, superseded those still contingent rights provided by the "old" statute.

Moreover, vesting is a two-way street; the employee's vested right is the employer's vested liability. Although employee in this case regards application of the "old" statute to be in his best interest, to treat disability caused in substantial part by each of several injuries as governed by the statute in effect at time of the original injury or to apportion the disability among several contributing injuries and apply the statute in effect on the date of injury to the portion of disability attributable to each injury would not only represent a significant departure from the principles upon which the law of workers' compensation rests; but would also in likelihood be a disservice to employees and employers alike.

Reversed and decision of workers' compensation judge reinstated.

State of Minnesota

WORKERS' COMPENSATION COURT OF APPEALS
55 SHERBURNE AVENUE
ST. PAUL, MINNESOTA 55103

File No. 474-60-7333 DECISION OF THE COURT OF APPEALS

James P. Joyce, Jr., Employee,

vs.

Lewis Bolt & Nut Company, Employer,

and

SERVED & FILED
NOV 18, 1986
WORKERS COMPENSATION
COURT OF APPEALS

1) Self-Insured,
2) Great American
Insurance Company, Insurers,

and

1) HMO Minnesota,
2) North American Life
Assurance Company, Intervenors,

and

Special Compensation Fund.

The appeal of the employee filed October 16, 1985 and the cross-appeal of the self-insured employer filed October 29, 1985 from the findings and order of Compensation Judge Bernard Dinner filed September 30, 1985 came on for hearing, pursuant to due notice to all parties, on July 2, 1986. John J. Horvei, Attorney at Law, 1500 West County Road B-2, Suite 100, Roseville, Minnesota, appeared on behalf of the employee. Sean Hade, Attorney at Law, 1900 Conwed Tower, St. Paul, Minnesota, appeared on behalf of the self-insured employer. Alan Page, Special Assistant Attorney General, 520 Lafayette Road, St. Paul, Minnesota, appeared on behalf of the Special Compensation Fund.

After considering the pleadings in the case, the transcript of evidence taken before the Compensation Judge, the exhibits admitted into evidence, oral arguments and briefs of counsel, and all of the files, records and proceedings herein, the Court is of the opinion that Findings 1 through 23, 25, 26, and 28 through 33 of the Compensation Judge together with paragraphs of the order of the Compensation Judge numbered 1, 2 and 5 through 10 are in accord with the evidence and the law in the case and are hereby adopted as those of the Court; and the Court is of the further opinion that Findings 24 and 27 and paragraphs 3 and 4 of the order of the Compensation Judge are not in accord with the evidence and the law in the case and are hereby vacated and set aside and in lieu thereof this Court makes the following findings and order:

FINDINGS

24. That as a combined result of personal injuries sustained August 23, 1981, May 24, 1982, March 7, 1983, May 17, 1983, October 16, 1983 and June 15, 1984, the employee has been temporarily totally disabled from June 15, 1984.

27. The employee's temporary total disability from and after June 15, 1984 was substantially greater as a result of the pre-existing physical impairments due to other personal injuries sus-

tained while the employer was self-insured for years 1981, 1982 and 1983 than would have resulted from personal injuries sustained June 15, 1984 alone.

ORDER

3. IT IS FURTHER ORDERED that Great American Insurance Company shall pay compensation to employee for temporary total disability from and after June 15, 1984 less amounts previously paid to employee from and after June 15, 1984 for such temporary total disability including credit for payments made pursuant to Temporary Order herein for temporary total compensation.

4. IT IS FURTHER ORDERED that Great American Insurance Company shall pay economic recovery benefits to the employee to which he may be entitled based upon permanent impairment to the body as a whole as a result of said personal injury to the back due to personal injury sustained June 15, 1984.

WORKERS' COMPENSATION COURT OF APPEALS
By */s/ Leigh J. Gard*
LEIGH J. GARD, Judge

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES, Judge

LESLIE M. ALTMAN, Judge
Separate Opinion

Dated at St. Paul, Minnesota
this 17th day of November, 1986.

MAJORITY OPINION

LEIGH J. GARD, Judge

We agree with the opinion of Judge Altman that this Court must affirm certain findings of the Compensation Judge as based upon substantial evidence when this record is viewed in its entirety. We believe that we must find that there is substantial evidence supporting the Compensation Judge's determination that the injury in 1984 was a permanent aggravation and that the employee's disability was made substantially greater because of the pre-existing condition. The Compensation Judge determined that maximum medical improvement was reached as of February 1, 1985 and awarded temporary total disability benefits through May 1, 1985; he declined to apportion liability because of the case of *Koski v. Erie Mining Company,* 223 N.W.2d 470, 27 W.C.D. 121 (Minn. 1973).

It is the argument of the employee that we should either hold that the evidence requires a finding that the injury in 1984 was only a temporary aggravation, or determine that the *Koski* case should not be applied. The *Koski* decision is that there is no apportionment to the employer and insurer responsible under the earlier injuries; the last insurer is responsible to pay the compensation provided for and is reimbursed for all other liability pursuant to the Workers' Compensation Act. The employee argues that the personal injuries of 1981 through 1983, including the 30% permanent partial disability of the back attributable thereto, constitute a substantial contributing factor to the employee's isolation from employment from and after February 1, 1985 and that compensation for temporary total disability should be paid by the employer, self-insured, based upon the effects of the October 16, 1983 injury as adjusted pursuant to Minn. Stat. § 176.645. The argument is that since these injuries in 1981 and 1983 are substantial factors in the ongoing disability of the employee from and after February 1, 1985, they must continue to be legally responsible for ongoing temporary total disability. It is also argued, by the employee, that the *Koski*

decision was a device to quiet litigation on apportionment and contribution disputes between employers and insurers regarding successive injuries and should not be interpreted by the Compensation Judge as a tool to defeat the claims of the employee here for ongoing temporary total disability benefits.

The self-insured employer argues that the Compensation Judge had an insubstantial evidentiary basis for the determination of a *Gillette* injury on August 23, 1981, that there is insubstantial evidence for the finding that the employer had due notice and knowledge of the alleged injuries, that the Compensation Judge's finding that the initial registration was properly rejected is not supported by substantial evidence, that the finding that the registration of September 12, 1984 was filed more than 180 days is not supported by substantial evidence, but that the Compensation Judge's finding that the June 15, 1984 injury resulted in a permanent aggravation of the spine is supported by substantial evidence. It is ultimately the argument of the self-insured employer that the Compensation Judge properly dismissed the self-insured employer. It is argued that the *Koski* case applies and that, during the numerous revisions of the workers' compensation statute, no change has been made with respect to the meaning and intent of Minn. Stat. § 176.131. The position of the Special Compensation Fund is that the findings of the Compensation Judge are supported by substantial evidence insofar as they deal with notice and registration of physical impairment.

The Compensation Judge determined that the injury of June 15, 1984 was a permanent aggravation, that the employee obtained maximum medical improvement on or about January 31, 1985 and awarded temporary total compensation benefits pursuant to the provisions of Minn. Stat. § 176.101, subd. 3e (1984). Subd. 3e provides that 90 days after an employee has reached maximum medical improvement, or 90 days after the end of an approved retraining program, whichever is later, the employee's temporary total compensation shall cease. The Compensation Judge found that the employee's disability from and after June 15, 1984 was substantially greater as a result of

the pre-existing impairments due to the personal injuries of 1981, 1982 and 1983 and, as the 1984 injury was registered with the Special Compensation Fund, the employer self-insured was dismissed as a party to the action since they are not liable for contribution or reimbursement for the employee's temporary total disability, after June 15, 1984, under the *Koski* decision. The employee was physically unable to return to his former employment and the employer had not offered the employee other forms of employment which he could accomplish in his condition. Therefore, the employee was entitled to economic recovery benefits provided under the law in effect as of the 1984 injury. There was no determination of permanent partial disability with respect to the 1984 injury. There is then no responsibility on the part of the self-insured employer for the injuries prior to the 1984 injury, and the insurer on the risk at the time of the June 15, 1984 injury is absolved from further liability for an ongoing disability after temporary total compensation for 90 days from and after the date of maximum medical improvement. There is the right of reimbursement against the Special Compensation Fund after the deductible provisions are met.

We agree that there is substantial evidence in this record, viewed in its entirety, for all of the factual determinations of the Compensation Judge and that such must be affirmed. We do not agree with the Compensation Judge's analysis of the applicable law nor with the opinion of Judge Altman affirming the Compensation Judge with respect to the application of the law. This employee has had extensive surgical procedures performed prior to the injury in 1984 and has a substantial permanent partial disability attributable to the injuries from 1981 through 1983. The employee has established and vested rights under the Workers' Compensation Laws in effect as of the dates of the injuries prior to 1984, which cannot be destroyed, simply by the occurrence of a further injury in 1984 under other provisions applicable to such injury. In other words, the employee's rights with respect to compensation benefits are neither diminished nor destroyed simply because he has sustained further injury

arising out of and in the course of his employment. He may have greater rights because of the injury in 1984, but the injury in 1984 does not destroy his vested and established rights with respect to earlier injuries. The decision of the Supreme Court in *Koski* is simply in accord with the provisions of the Workers' Compensation Act with respect to the responsibilities of the Special Compensation Fund and the assessment of liability. The *Koski* decision has nothing to do with the destruction of rights of employees, but only with the relative responsibilities of the employer and its insurers and the Special Compensation Fund, which is a Fund created and paid into by the employers and insurers. It is a Fund created to alleviate certain responsibilities under the conditions stated and to encourage the employment of handicapped persons. The Fund is not created, and the statute with respect to it was not enacted in order to destroy rights of employees. The policy of the Workers' Compensation Act of Minnesota is to provide that industry shall bear the cost of workplace injuries, not the public welfare system by interpretations of this Court asserting technical provisions of statute or case law in order to relieve employers and insurers of responsibility for the results of workplace injuries.

The employee here has been provided with no work which he can do in his physical condition due to the injuries which arose out of and in the course of his employment. All of the injuries which he has sustained through 1984 contribute substantially and materially to his ongoing disability. The provisions in the current law with respect to the Special Compensation Fund, namely Minn. Stat. § 176.131, subd. 1 (1984) are essentially unchanged and this Court is in no position to overrule the *Koski* decision. It seems, however, to be the import of the Compensation Judge's decision that after the temporary total compensation is paid pursuant to the award made, the employee will receive economic recovery compensation under the provisions of Minn. Stat. § 176.101, subd. 3a (1984) and then be washed cleanly from the system forever regardless of the ongoing effects of the personal injuries from 1981 through 1984. We hold that, where the evidence establishes that the 1984 injury, combined

with the earlier permanent injuries, is the material and substantial cause of the employee's ongoing temporary total or temporary partial disability, the employer and insurer liable under the 1984 personal injury is responsible for payments to the employee for temporary total disability under Minn. Stat. § 176.101, subd. 1 (1984) or for temporary partial disabilities pursuant to the provisions of Minn. Stat. § 176.101, subd. 2 (1984). This employer and insurer would have a claim for reimbursement against the Special Compensation Fund, as here provided, since the effects of the injury in 1984 were made substantially greater because of the pre-existing condition, after the employer and insurer have paid benefits under the deductible provisions provided for in Minn. Stat. § 176.131, subd. 1 (1984). The employer and insurer have taken the employee, or continued the employee, in their employment after the injuries of 1981 through 1983 subject to the disability resulting from such personal injury and subject to the provisions of the Minnesota Workers' Compensation Act and the policy underlying it. The employee brings with him all of the established rights pursuant to the Workers' Compensation Acts in effect at the time of his personal injuries from 1981 through 1983, and the employer and insurer cannot escape responsibility under the provisions of Minn. Stat. § 176.101, subd. 3a through 3v (1984). The rights are not subject to divestiture by a later enactment of the Workers' Compensation Act.

Such an analysis of the law is necessary regardless of what the provisions of the 1983 amendments to the Workers' Compensation Law may be. If the terms of the Act in 1983, literally taken, led to a divestiture of employee's established rights, such would not be valid and enforceable. Nevertheless, we do not find that such is the case. The provisions of the 1983 law with respect to temporary total disability indicate clearly that benefits shall be paid during the temporary total disability, subject to subd. 3a through 3u. The benefits for temporary partial disability shall be paid as provided under the earlier provisions of the law, except that a diligent search for employment is no longer required, except as provided in Sec. 176.101. Subd. 3a provides for

economic recovery compensation for an established permanent partial disability. Subd. 3b provides for impairment compensation based upon a permanent partial disability determined under the Act. The Act is especially confusing because there is no subd. 3, but it is clear that economic recovery compensation and impairment compensation under subds. 3a and 3b deal with the established and determined permanent partial disability and the benefits payable therefor. The Compensation Judge's finding 24 cannot stand because it provides that, as a combined result of the personal injury sustained August 23, 1981, May 24, 1982, March 7, 1983, May 7, 1983, October 16, 1983 and June 15, 1984, the employee has been temporarily and totally disabled from June 15, 1984 up to date employee reached maximum medical improvement from and after personal injury sustained June 15, 1984. The facts reveal that the employee's temporary total disability, as a combined result of the injuries, has continued. The law in effect prior to the 1983 amendments made no reference to maximum medical improvement at all, and, therefore, such language contained in Minn. Stat. § 176.101, subd. 3e (1984) cannot limit the application of the law in effect at the time of the injuries prior to such amendments. The 1984 injury is not alone responsible for the employee's disability, but all of these injuries, as stated by the Compensation Judge, contributed substantially and materially to the ongoing temporary total disability. 3e clearly provides for the technical termination of temporary total compensation with respect to the 1984 injury, 90 days after maximum medical improvement, but cannot and does not have any effect upon the vested rights to temporary total disability benefits as provided for in the previous enactments of the Workers' Compensation Law. There is no reason to interpret the phrase "temporary total compensation" as synonymous with "temporary total disability" as provided in the earlier provisions of the Act. The only reason for making such a determination would be for the purpose of defeating the employee's rights under the law, which would be contrary to the policy of the Act itself. The Compensation Judge, therefore, erred in his order paragraph 3 limiting the benefitss to which the

employee is entitled to and erringly used the phrase "temporary and total disability."

There is no issue with regard to the determination of a temporary partial disability in this case. It appears that the employee is in fact temporarily totally disabled and has been to the date of hearing before the Compensation Judge on a continuing basis. There is no reason for determining that the compensation rate applicable to the last injury should not be used in determining the rate of benefits payable to the employee. This is the rate which is applicable to the loss in income which the employee has because of his ongoing temporary total disability. Ultimately, the Special Compensation Fund, created for such a purpose, will be responsible for the benefits after the deductible provisions. The Compensation Judge has provided that economic recovery benefits to which the employee would be entitled is payable at the same intervals and in the same amount as temporary total compensation paid by the insurer and that there would be a credit for any payments to the employee after the date of May 1, 1985. The Compensation Judge contemplated a new claim petition with respect to the 1984 injury. Such determination, with respect to economic recovery compensation, as discussed by the Compensation Judge, deals solely with the injury in 1984. They have no application to some contrived limitation with regard to temporary total disability benefits due to the employee as a result of the combined effects of all of his personal injuries arising out of and in the course of his employment. The employee's claim is for benefits from and after February 2, 1985 on a continuing basis and such must be awarded, unless it is found by the Compensation Judge that the employee is not in fact temporarily totally disabled. The Compensation Judge mistakenly limited the period of temporary total disability in finding 24, apparently only because of his interpretation of the law which we believe to be in error. There is no finding specifically with respect to the disability of the employee after the non-work related automobile accident occurring on February 1, 1985. Pargraph 3 of the order of the Compensation Judge is for the payment of temporary total disability

benefits to May 1, 1985, as being the ending of the 90 days after maximum medical improvement on January 31, 1985; apparently, therefore, the Compensation Judge inferred that the employee was, as the evidence seems to reveal, temporarily and totally disabled on an ongoing basis.

LJG/eam

SEPARATE OPINION

Concurring in Part - Dissenting in Part

LESLIE M. ALTMAN, Judge

This matter is before us on the appeal by the employee and cross-appeal by the self-insured employer from the decision of Compensation Judge Bernard Dinner. The employee contends that his work injuries of August 23, 1981 and October 16, 1983 were the substantial contributing causes of his disability and that the June 15, 1984 injury was a temporary aggravation so that the ongoing temporary total disability should have been awarded. It is the self-insured's claim that the employee's injury of August 23, 1981 was not work-related and that its attempted registration of the September 1, 1982 injury should have been accepted by the Special Compensation Fund.

The compensation judge held that the June 15, 1984 injury was a permanent aggravation and that the employee's disability was made substantially greater by his pre-existing condition. As maximum medical improvement had been reached on February 1, 1985, the compensation judge awarded temporary total disability through May 1, 1985 and declined to apportion liability under *Koski v. Erie Mining Company,,* 223 N.W.2d 470, 27 W.C.D. 121, (Minn. 1973). We affirm.

In 1974 the employee was hired by the employer first as a heater and later as a header. Both of these jobs involved

repetitive bending, lifting and twisting. The employee began to experience back pain in March, 1981. By June, 1981 this pain radiated into the right leg.[1] After the employee left work on August 24, 1981, he underwent back surgery for a disc herniation at the L5-S1 level. As the pain then subsided, the employee returned to light duty work on December 1, 1981. The employee testified that he felt quite good at this time. He missed no work time until the next May.

On May 24, 1982 the employee was operating a jackhammer at work when he felt his back snap. He was again absent from work until June 7, 1982 at which time he resumed light duty work. The employee testified that his back pain subsided and he had "very little" pain in his buttocks at this time. By September, 1982 he had resumed his prior position as a header.

His next period of disability began on March 7, 1983 due to increased back pain and left leg pain. After receiving physical therapy the employee again returned to light duty work on March 28, 1983. He continued to have some back pain but no leg pain. When the employee was shifted to the position of expediter, which was more physically demanding, his back pain increased. He left work again until August 31, 1983. During this period he received chymopapain therapy and a back brace. Nevertheless, his back pain continued with greater frequency after he returned to light duty work on August 31, 1983. By October 16, 1983 the back pain became so intense that he had to leave work. The employee underwent back surgery on December 29, 1983 at the L4-5 level after which he felt nearly pain-free.

The employee was again released to light duty work on February 21, 1984. After a month he was asked to transfer to his earlier job as a header. He agreed to this as long as the heavy physical duties were handled by someone else. On June 15, 1984 his supervisor moved him back to his heater job. After shoveling bolts for a couple of hours his lower back became so painful

[1]While the self-insured contends that a repelling incident in July, 1981 caused this impairment, there is sufficient evidence showing that this injury was work-related.

that he could not continue. An epidural injection and a body cast did not ameliorate the employee's constant back pain and periodic leg pain. The employee testified that he felt unable to return to any physical job with the employer after June 15, 1984.

On February 1, 1985 the employee was involved in a non-work automobile accident. This was followed on February 21, 1985 by a third laminectomy. This has not relieved the employee's constant back pain. Comparing this to his condition prior to the accident, the employee stated that his back was more susceptible to exacerbation than before. In addition these exacerbations were now more painful. The employee testified that he felt no right leg pain.

The employee has treated with Dr. John Dowdle, an orthopedist during most of the periods of disability. In his deposition Dr. Dowdle described the employee's condition as degenerative disc disease. It was his opinion that the June 15, 1984 work injury was a temporary aggravation as the employee showed improvement afterwards and was released to light duty work. Testifying by deposition at the employee's request, Dr. Robert Wengler concluded that the June 15, 1984 incident was a permanent aggravation. Dr. Wengler testified that when he examined the employee in May, 1984, he was "doing well." By July, 1984, however, the employee showed signs of new structural damage at the L4-5 level of the back.

The self-insured has made several attempts to register these injuries with the Special Compensation Fund. The first application was filed with the Fund on September 1, 1982. The Fund requested further proof that the condition was registerable on December 17, 1982. When this information was not forthcoming, the application was rejected on February 17, 1983. Another application was submitted in August, 1984. This was accepted only for the June 15, 1984 injury, as it was the only injury to have occurred within 180 days after the submission of the application.

Compensation Judge Dinner found that the June 15, 1984 injury was a permanent aggravation and a substantial

contributing cause of the employee's disability after February 1, 1985. The compensation judge further denied apportionment under *Koski.*

The employee asks us to find that the employee's continuing disability is the result of the 1981 and 1983 injuries and not the June 15, 1984 injury. This is proposed not on the basis of the merits of his claim, but as a means by which to circumvent the interaction of the *Koski* decision and the new two-tier benefit system. As legislative policy making is the legislature's preogative, I would hold only that there is substantial evidence to support the compensation judge's finding that the June 15, 1984 injury was a permanent aggravation and a substantial contributing cause of the employee's ongoing disability.

There is ample evidence that the June 15, 1984 injury constituted a permanent aggravation. The employee described a marked change in his condition before and after the June 15, 1984 injury. After the 1981 and 1983 injuries his condition improved with treatment until he was "pain-free" after his second surgery. Since the June 15, 1984 injury, however, the employee has been in constant pain. While he was previously able to perform several physically demanding positions with the employer, he now feels that he would be unable to return to even his light duty jobs with the employer. Dr. Wengler also testified that the results of his May, 1984 examination of the employee were encouraging, and that the employee was doing well. His exam after June, 1984 revealed new disc damage and a deterioration in the employee's condition. The compensation judge not unreasonably gave greater weight to Dr. Wengler's findings than to the conflicting opinion of Dr. Dowdle.

It is undisputed that the June 15, 1984 injury was properly retroactively registered with the Special Compensation Fund. I also agree with the compensation judge that valid registrations of the prior injuries were not effected.[2] Proof of a 15% permanent partial disability is necessary to register a back condition

[2]The record clearly shows that the employee notified his supervisors that his work was bothering his back each time he was injured. There is thus no merit in the self-insured's denial of notice or knowledge of the employee's injuries.

under Minn. Stat. § 176.131, subd. 8(o) (1982). As this proof was not produced until August, 1984, registration could not be accepted until that time. The self-insured contends that the Fund was estopped from denying registration in February, 1983 because the Fund failed to timely process its application. However, the self-insured's application was rejected in February, 1983 not for untimeliness, but for failure to show the requisite impairment. For this reason this argument is groundless.

The June 15, 1984 injury was thus a permanent aggravation and substantial contributing cause of the employee's disability.[3] As this injury met all the elements of the second injury law, the compensation judge was thus required to award benefits in accordance with the new two-tier system and to deny apportionment under *Koski.*

LMA/eam

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[3]Because the employee's ongoing disability is attributable to the 1984 injury, his entitlement to benefits in connection with 1981 and 1983 injuries is irrelevant.

State of Minnesota
OFFICE OF ADMINISTRATIVE HEARINGS
WORKERS' COMPENSATION SECTION
400 Summit Bank Building
310 Fourth Avenue South
Minneapolis, Minnesota 55415

File No. 474-60-7333
OAH ID: 090481

James P. Joyce, Jr.,
Employee,

vs.

Lewis Bolt & Nut Company,
Employer,

and

1) Self-Insured,
2) Great American Insurance Company,
Insurers,

and

1) HMO Minnesota,
2) North American Life Assurance Company
Intervenors,

and

Special Compensation Fund.

FINDINGS AND ORDER

SERVED AND FILED
September 30, 1985
OFFICE OF ADMINISTRATIVE HEARINGS

The above-entitled matter came on for hearing, pursuant to notice, before Bernard Dinner, a Compensation Judge of the Office of Administrative Hearings, on July 23 and 24, 1985 at the Third Floor, Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota.

John J. Horvei, attorney at law, Horvei & Krueger, P.A. Suite 100, 1500 West County Road B-2, Roseville, Minnesota 55113, appeared on behalf of the employee. Sean B. Hade, attorney at law, Jardine, Logan & O'Brien, 1900 Conwed Tower, 444 Cedar Street, St. Paul, Minnesota 55101, appeared on behalf of self-insured employer. Kent Charpentier, attorney at law, Suite 221, Opus Center, 9900 Bren Road East, Minnetonka, Minnesota 55343, appeared on behalf of Great American Insurance Company and the employer. Indru S. Advani, 3535 Blue Cross Road, Box 43560, St. Paul, Minnesota 55164, appeared on behalf of HMO Minnesota. Alan C. Page, special assistant attorney general, 444 Layfayette Road, St. Paul, Minnesota 55101, appeared on behalf of the Special Compensation Fund. Martha Simonett, 2500 First Bank Place West, Minneapolis, Minnesota, appeared on behalf of intervenor, North American Life Insurance Company.

The record in this matter closed upon receipt of deposition of Dr. Robert A. Wengler filed September 16, 1985.

Notice is hereby given that any person aggrieved by the decision herein may appeal the decision, or any portion thereof, to the Workers' Compensation Court of Appeals. An appeal must be filed with the Chief Administrative Law Judge no later than 30 days following service of this order; it must contain the information required by Minn. Stat. § 176.421; and must be accompanied by the $25.00 fee required by Minn. Stat. § 176.421, subd. 4.

Based upon all of the files, records and proceedings herein, the Compensation Judge makes the following:

FINDINGS

1. The issue of fact and law presented is the extent of disability, causal relationship, registration under the second injury law.

2. On or about August 23, 1981, May 24, 1982, March 7, 1983, May 17, 1983, October 16, 1983, the employee was in the employ of employer, Lewis Bolt & Nut Company under a Minnesota contract of hire at the respective wage rates which include cost of living adjustments as follows:

1) August 23, 1981 $10.03 an hour x 40 = $401.20
2) May 24, 1982 $10.40 an hour x 40 = $418.80
3) March 6, 1983 $10.30 an hour x 40 = $412.00
4) May 17, 1983 $10.50 an hour x 40 = $420.80
5) October 16, 1983 $9.31 an hour x 40 = $372.40 per week.

3. That on said dates the employer, Lewis Bolt & Nut Company, was self-insured for Minnesota workers' compensation liability in accordance with the laws of the State of Minnesota.

4. On said dates, employee sustained personal injuries to the back arising out of and in the course of employment with said employer in the nature of Gillette injuries or daily trauma to the back in the normal course of employment except for a specific injury to the back on May 24, 1982.

5. As a result of personal injuries sustained May 24, 1982, employer/self-insurer paid compensation to employee for 1.8 weeks for period May 25, 1982 to June 16, 1982 at rate $267.00 for total $480.60.

6. That employer, Lewis Bolt & Nut Company, had due notice and knowledge of said personal injuries and such knowledge as would place employee's supervisors on reasonable notice of employee's personal injuries to the back.

7. As a result of personal injury sustained in normal course of employment up to August 23, 1981 employee was temporarily totally disabled for two days August 24 and August 25 and for 13 weeks and three days for period August 28 to November 30, 1981 for a total of 13.5 weeks.

8. As a result of personal injury sustained in normal course of employment as a result of daily trauma due to work activity up through March 6, 1983 employee was temporarily totally disabled from March 7, 1983 to March 28, 1983 a period of 3.2 weeks.

9. As a result of said personal injuries sustained on or about March 6, 1983 intervenor, North American Life Assurance Company, paid disability benefits to employee for a period of temporary total March 10 through March 21, 1983 in the sum of $239.41 for which amount intervenor is entitled to reimbursement.

10. As a result of personal injury sustained in the normal course of employment and daily work activity up to May 17, 1983 employee was temporarily totally disabled for period May 18, 1983 to August 31, 1983 15 weeks.

11. That as a result of said personal injury sustained up to May 17, 1983 intervenor, North American Life Assurance Company, paid disability to employee from June 2, 1983 through August 25, 1983 in the sum of $1,699.40 for which amount intervenor is entitled to reimbursement.

12. As a result of personal injury sustained in normal course of employment with employer and daily work activity up through October 16, 1983 employee was temporarily totally disabled from October 17, 1983 to February 10, 1984 a period of 18 weeks.

13. As a result of personal injury sustained in the normal course of employment and daily work activity up to October 16, 1983 intervenor, North American Life Assurance Company, paid disability benefits to employee in a net amount from October 16, 1983 through February 25, 1984 in the sum of $2,659.06 less one week in the sum of $139.95 for temporary total awarded to employee only through February 19, 1984, for a net balance of $2,519.11 for which intervenor claims and is entitled to reimbursement.

14. That as a further result of personal injury sustained in the normal course of employment due to daily work activity up to on or about August 23, 1981 employee has sustained a 15% permanent partial disability to the back.

15. As a result of personal injury sustained in the normal course of employment and daily work activity up to October 16, 1983 employee has sustained a 15% permanent partial disability to the back.

16. That application by employer/self-insurer for registration of claimed physical impairment to the back as submitted to the Minnesota Department of Labor and Industry was properly rejected for registration by the Department of Labor and Industry for failure of supporting medical report to show any physical impairment for which at least 50 weeks or more of weekly benefits would be payable as permanent partial disability if the physical impairment were evaluated according to standards used in workers' compensation proceedings Minn. Stat. § 176.131, subd. 8(o) (1981).

17. That the medical reports attached to said petition for registration by employer/self-insurer show a lumbar disc was excised at L5-S1 but from the reports attached it cannot be determined that employee had sustained a permanent partial disability which it would entitle him to at least 50 weeks permanent partial disability [e.g. 15% permanent partial equals 52½ weeks and 10% equals 35 weeks and 5% equals 17½ weeks].

18. That registration September 12, 1984 by employer/self-insurer was filed more than 180 days after notice of the employee's personal injuries in 1983 was received by the employer. Minn. Stat. § 176.131 subd. 8(o) (1981).

19. That employer/self-insurer had due notice and knowledge of employee's personal injuries in 1981 and 1983 at the time the employee had two surgical procedures and laminectomies to the back on September 8, 1981 and December 28, 1983; and such knowledge as would place the employer through employer's foremen or supervisors on reasonable notice and duty to inquire as to the relationship of employee's surgical procedures to the back and employee's employment activity [employee's testimony and testimony Robert E. Mountain vice president of operations deposition p. 42 11. 1-9].

20. On June 15, 1984 the employer was insured for Minnesota workers' compensation liability by Great American Insurance Company at a stipulated wage of $369.20 per week or $9.23 an hour for a 40-hour week.

21. That on June 15, 1984 the employee sustained a personal injury and aggravation to low back arising out of and in the

course of said employment.

22. That employer had due notice and knowledge of said personal injury.

23. That as a result of said personal injury Great American Insurance Company paid compensation to employee for a period of time after said personal injury in an amount undetermined from the record and at a later date the insurer commenced payment to employee pursuant to a Temporary Order and was paying compensation to employee pursuant to said Temporary Order at the time of hearing; and the exact payments made by Great American Insurance Company to employee pursuant to said Temporary Order are undetermined from the record.

24. That as a combined result of personal injuries sustained August 23, 1981, May 24, 1982, March 7, 1983, May 17, 1983, October 16, 1983 and June 15, 1984 employee has been temporarily and totally disabled from June 15, 1984 up to date employee reached maximum medical improvement from and after personal injuries sustained June 15, 1984.

25. That personal injury sustained June 15, 1984 is a substantial, contributing cause to said temporary total disability.

26. That on or about January 31, 1985 and prior to a non-work-related automobile accident sustained on February 1, 1985 employee had reached maximum medical improvement as a result of personal injury sustained on or about June 15, 1984. Deposition Wengler p. 49 11. 19-25 and p. 50 11. 7-10 and p. 51 11. 1-5; and deposition Dr. John A. Dowdle, Jr., p. 25 11. 11-17.

27. That employee's temporary total disability from and after June 15, 1984 to date of maximum medical improvement January 31, 1985 was substantially greater as a result of pre-existing physical impairments due to prior personal injuries sustained while employer was self-insured for years 1981, 1982 and 1983 than what would have resulted from personal injury sustained June 15, 1984 alone.

28. That personal injury sustained June 15, 1984 was duly registered with the second injury fund, Minnesota Department

of Labor and Industry on August 27, 1984.

29. That the employer has not offered the employee a light duty job nor a "suitable" job either before or after maximum medical improvement had been reached. Minn. Stat. § 176.101 subd. 3e and 3f.

30. That personal injury sustained June 15, 1984 resulted in a permanent aggravation to the back but employee's attorney was not making a claim for permanent partial disability to the back as a result of said personal injury at the time of this proceeding.

31. That on February 1, 1985 employee sustained further aggravation to the back as a result of the non-work-related automobile accident.

32. That employee has entered into a contingency fee agreement with attorney of record for 25% of compensation up to $4,000.00 and 20% of the balance not to exceed $6,500.00 and upon filing of a Statement of Attorney's Fees with service upon employee and attorney for insurer and absent objection thereto within ten days of service upon them said fee agreement is conclusively presumed to be reasonable in this action.

33. That HMO Minnesota paid hospital and medical benefits on behalf of employee in the sum of $13,723.51 but the reasonable value and necessity of said medical and hospital treatment is undetermined and the parties have not stipulated to the reasonable value in accord with the guidelines of the Department of Labor and Industry and the case is to be referred to the Minnesota Department of Labor and Industry for medical review and monitoring. Minn. Stat. § 176.103.

Based upon the foregoing Findings, the Compensation Judge makes the following:

ORDER

1. Lewis Bolt and Nut Company, employer and self/insured, shall pay compensation to employee as follows:

1) $3,294.00 for temporary total disability 13.5 weeks at rate $244.00 for period August 24, 1981 to November 30, 1981 as a result of personal injury sustained August 23, 1981;

2) $ 539.57 representing 3.2 weeks temporary total disability at rate $274.68 in the sum of $878.98 less $239.41 in disability benefits paid to employee by intervenor, North American Life Assurance Company, and as a result of personal injury sustained to the back on March 6, 1983;

3) $2,546.92 representing 15.2 weeks temporary total disability for period May 18, 1983 to August 31, 1983 at rate $280.55 in the sum of $4,264.32 less $1,699.40 net amount paid to employee by intervenor, North American Life Assurance Company, for period June 2, 1983 through August 25, 1983 and said payments as a result of personal injury sustained to the back on May 17, 1983;

4) $1,955.33 representing temporary total disability for period October 17, 1983 to February 20, 1984 18 weeks at rate $248.58 in the sum of $4,474.44 less the sum of $2,519.11 the net amount paid to employee in disability benefits by intervenor, North American Life Assurance Company, said payments as a result of personal injury to the back sustained on or about October 16, 1983; for total payments to employee for temporary total disability by employer/ self-insurer in the sum of $8,353.82 including interest at legal rate and reasonable costs and disbursements of this action.

2. IT IS FURTHER ORDERED that employer/self-insurer shall pay compensation to employee for 52½ weeks at rate $244.00 in the sum of $12,810.00 representing payment for 15% permanent partial disability to the back as a result of personal injury sustained August 23, 1981 and shall pay $13,050.45 representing an additional 52½ weeks at rate $248.58 for 15% permanent partial disability to the back as a result of personal injury to the back sustained on or about October 16, 1983 for total payment of permanent partial disability as a result of said personal injuries in the sum of $25,860.45 and for a total payment of temporary total and permanent partial to be paid by employer/self-insurer in the sum of $34,214.27 including interest at legal rate and reasonable costs and disbursements of this action.

3. IT IS FURTHER ORDERED that Great American Insurance Company shall pay compensation to employee for temporary and total disability from and after June 15, 1984 to May 1, 1985 [90 days after maximum medical improvement on January 31, 1985] less amounts previously paid to employee from and after June 15, 1984 for temporary total disability and to include credit for payments made by said insurer pursuant to Temporary Order.

4. IT IS FURTHER ORDERED that Great American Insurance Company shall pay economic recovery benefits to employee from and after May 1, 1985 in an amount to which employee may be entitled based upon permanent impairment to the body as a whole as a result of personal injury to the back due to personal injury sustained June 15, 1984 less credit for payments which may have heretofore been made to employee by said insurer from and after May 1, 1985 pursuant to Temporary Order and in accordance with the provisions and limitations of the Minnesota Workers' Compensation Law.

5. IT IS FURTHER ORDERED that Great American Insurance Company shall be reimbursed by the state compensation fund for all payments of temporary total disability to employee as may be in excess of 52 weeks and for medical expenses as may be paid in excess of $2,000.00, from and after

personal injury sustained June 15, 1984 and for temporary total disability which was substantially greater as a result of pre-existing physical impairment which was previously registered with the Minnesota Department of Labor and Industry and which disability was substantially greater than what would have resulted from personal injury sustained June 15, 1984 alone. Minn. Stat. § 176.131. [From June 15, 1984 to May 1, 1985 52 weeks had not elapsed.]

6. IT IS FURTHER ORDERED that employer/self-insured shall reimburse intervenor, North American Life Assurance Company, as follows: $239.41, $1,699.40 and $2,519.11 for a total sum of $4,457.92 as reimbursement for disability benefits heretofore paid to the employee by said group carrier for personal injuries sustained while said self-insured was on the risk for workers' compensation liability.

7. IT IS FURTHER ORDERED that the claim by HMO Minnesota for reimbursement of medical and hospital expenses in the sum of $13,723.51 is referred to the Minnesota Department of Labor and Industry for medical review as to the reasonable value and necessity of said medical expenses. Minn. Stat. § 176.103.

8. IT IS FURTHER ORDERED that upon payment as herein awarded to employee by Lewis Bolt & Nut Company as self-insured that said employer as self-insured be dismissed as a party to this action. *Koski v. Erie Mining Co.,* 223 NW2d 470 [Minn. 1973].

9. IT IS FURTHER ORDERED that of the compensation payable to the employee that 25 percent of the first $4,000.00 and 20 percent of the balance be deducted and paid to employee's attorney absent objections to a statement of fees when filed and served upon the parties within 10 days of service upon them, and said attorney's fees up to a maximum of $6,500.00 shall conclusively be presumed to be reasonable in this action. Minn. Stat. § 176.081.

10. IT IS FURTHER ORDERED that the balance of compensation after deduction for fees, be paid directly to the employee with interest at the legal rate and reasonable costs and

disbursements of this action.

/s/ Bernard Dinner
BERNARD DINNER
Compensation Judge
(612) 341-7635
Dated at Minneapolis, Minnesota
this 30th of September, 1985.
Court reporter: Nola Bushnell of
Janet L. Shaddix & Associates Court Reporters

BD:kml

MEMORANDUM

1. Extent of Disability

The medical testimony in this case is uncontroverted that employee sustained maximum medical improvement following the last work-related personal injury on June 15, 1984 prior to the non-work-related automobile accident subsequently sustained on February 1, 1985. Deposition Dr. Robert Wengler, p. 49 11. 19-25, p. 50 11. 7-10 and p. 51 11. 1-5; deposition Dr. John A. Dowdle, Jr., p. 25 11. 11-17. Based upon the testimony the Compensation Judge concludes that the employee had reached maximum medical improvement prior to February 1, 1985 or by January 31, 1985.

Compensation has therefore been awarded to employee for temporary total disability from and after the June 15, 1984 injury to May 1, 1985. Minn. Stat. § 176.101, subd. 3e [effective January 30, 1984].

As employee's disability from and after June 15, 1984 was substantially greater as a result of the pre-existing impairments

due to prior personal injuries sustained while the employer was self-insured for years 1981, 1982 and 1983, and as the 1984 injury was formally registered with the Special Compensation Fund, the employer/self-insurer has been dismissed as a party to this action as they are not further liable for contribution or reimbursement for employee's temporary and total disability from and after June 15, 1984. *Koski v. Erie Mining Co., supra.*

As the employee is physically unable to return to his former type of employment with the employer and as the employer has not offered the employee other forms of employment which the employee would be able to do in either light duty or a "suitable" job offer, employee is entitled to economic recovery benefits 90 days after the end of maximum medical improvement or from and after February 1, 1985. As economic recovery compensation is payable at the same intervals and in the same amount as temporary total compensation was paid the insurer will have a credit for any payments made to the employee from and after May 1, 1985 and which payments were made to the employee pursuant to a Temporary Order.

Employee's attorney advised the Compensation Judge that there would be no claim for permanent partial disability to the back or under the new law for general bodily disability as a result of injury to the back due to personal injury sustained June 15, 1984 at the time of this proceeding. Dr. Wengler did give his opinion as to the general bodily disability as a result of injury to the back due to the June 15, 1984 injury however the Compensation Judge has not made any finding on that disability as it was not in issue at the time of the hearing based upon the statement by employee's attorney. If there is a dispute as to the extent of economic recovery benefit, a new claim petition will have to be filed on that issue. Under the new law it is clear that "90 days after employee has reached maximum medical improvement or 90 days after the end of an approved retraining program, whichever is later, the employee's temporary total

compensation shall cease. This cessation shall occur at an early date if otherwise provided by this chapter." Minn. Stat. § 176.101, subd. 3e.

2. Causal Relationship

Employee had prior exacerbations while employed with the employer. The symptoms came on in the course of heavy work. Employee complained of inability to do the heavy work on numerous occasions.

On September 8, 1981 and December 28, 1983 employee had to undergo two laminectomies in the lumbar area. He was place on lighter duty for periods of time after the surgeries but was eventually returned to his employment in the "hothouse"; and on one occasion was given an assistant or helper if he would return to the prior job.

After the June 15, 1984 injury employee has been unable to return to his former employment with the employer. The employer has not offered any employment which employee is able to do after the June 15, 1984 aggravation.

The employee was still having some back symptoms and was about to be released by Dr. Dowdle when he sustained an automobile accident on February 1, 1985. Both Dr. Dowdle and Dr. Wengler testified that employee had reached maximum medical improvement prior to the automobile accident. Under the statute employee's temporary total disability for the June 15, 1984 injury can only extend 90 days beyond the date that employee had reached maximum medical improvement or after the end of an approved retraining program. As there was no approved retraining program the employee has been awarded temporary total disability as a result of the June 15, 1984 injury up to maximum medical improvement for that injury.

The February 1, 1985 non-work-related automobile accident further aggravated the employee's back and has contributed to his present unemployability. The employee was having continued symptoms from the prior work-related injuries and from

and after the June 15, 1984 injury right up to the time that the car accident occurred and he was about to be discharged from treatment by his treating doctor just prior to the automobile accident.

Under the new Workers' Compensation Law effective January 30, 1984 employee can only be awarded for temporary and total disability for the limited period of time after maximum medical improvement has occurred; and with provision for economic recovery compensation where no suitable job offer has otherwise been made. As Great American Insurance Company was on the risk at the time of the June 15, 1984 injury and as that injury by medical testimony was substantially greater as a result of the pre-existing physical impairments due to the prior personal injuries sustained in 1981, 1982 and 1983 Great American Insurance Company is liable for the temporary total disability for 90 days from and after date of maximum medical improvement, with the right to claim reimbursement against the Special Compensation Fund if the threshold of 52 weeks of benefits has been reached.

The employer/self-insured on the risk has been dismissed as a party as apportionment or contribution cannot be held against said carrier where the last personal injury was made substantially greater as a result of said pre-existing physical impairments and for which Great American Insurance Company would be liable for the temporary total as stated with right to claim reimbursement against the Special Compensation Fund. *Koski v. Erie Mining Co., supra.*

3. **Registration by Employer/Self-insurer**

The application for registration by employer/self-insurer was returned by the Minnesota Department of Labor and Industry for failure of employer/self-insurer to show an impairment for which at least 50 weeks of permanent partial disability was payable. Minn. Stat. § 176.131, subd. 8(o).

The medical and operative reports filed at the time of that application show that a laminectomy and excision of L5-S1 was performed on September 8, 1981.

However, upon review of the reports the Compensation Judge concludes with the decision of the Department of Labor and Industry that after review of the reports a person cannot affirmatively conclude that at the time the reports were filed the reports reflected a permanent partial disability which would entitle the employee to at least 50 weeks in permanent partial disability. The 50 week provision is statutory. Minn. Stat. § 176.131, subd. 8(o).

The medical history and symptoms related by report might as easily relate to a 10% as to a 15% permanent partial disability to the back. The Minnesota Department of Labor asked for a supplemental medical report to support the application, however the employer/self-insurer did not provide such a report.

4. **Extent Permanent Partial Disability**

The 15% permanent partial disability attributed to the 1981 injury and 15% to the October 1983 is supported by Dr. Dowdle. These injuries sustained in a normal course of employment resulted in the need for surgery on September 8, 1981 and on December 29, 1983 respectively.

BD

Minn Stat § 176.101 (1984):

176.101 [COMPENSATION SCHEDULE.]

Subdivision 1. [TEMPORARY TOTAL DISABILITY.] For injury producing temporary total disability, the compensation is 66-2/3 percent of the weekly wage at the time of injury.

(1) provided that during the year commencing on October 1, 1979, and each year thereafter, commencing on October 1, the maximum weekly compensation payable is the statewide average weekly wage for the period ending December 31, of the preceding year.

(2) The minimum weekly compensation benefits for temporary total disability shall be not less than 50 percent of the statewide average weekly wage or the injured employee's actual weekly wage, whichever is less. In no case shall a weekly benefit be less than 20 percent of the statewide average weekly wage.

Subject to subdivisions 3a to 3u this compenstion shall be paid during the period of disability, payment to be made at the intervals when the wage was payable, as nearly as may be.

Subd. 2. [TEMPORARY PARTIAL DISABILITY.] In all cases of temporary partial disability the compensation shall be 66-2/3 percent of the difference between the weekly wage of the employee at the time of injury and the wage the employee is able to earn in the employee's partially disabled condition. This compensation shall be paid during the period of disability except as provided in section 176.101, payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to the maximum compensation equal to the statewide average weekly wage.

Subd. 3a. [ECONOMIC RECOVERY COMPENSATION.] If an employee is not eligible for an impairment award pursuant to subdivision 3b, then the employee shall receive economic recovery compensation for a permanent partial disability pursuant to this subdivision. The compensation shall be 66-2/3 per-

cent of the weekly wage at the time of injury subject to a maximum equal to the statewide average weekly wage. For permanent partial disability up to the percent of the whole body in the following schedule the compensation shall be paid for the proportion that the loss of function of the disabled part bears to the whole body multiplied by the number of weeks aligned with that percent.

Percent of disability	Weeks of compensation
0-25	600
26-30	640
31-35	680
36-40	720
41-45	760
46-50	800
51-55	880
56-60	960
61-65	1040
66-70	1120
71-100	1200

The percentage loss in all cases under this subdivision is determined according to the rules adopted by the commissioner pursuant to section 176.105, subdivision 4. This subdivision shall apply to a permanent partial disability incurred on or after the adoption of those rules.

Subd. 3b. [IMPAIRMENT COMPENSATION.] An employee who suffers a permanent partial disability due to a personal injury and receives impairment compensation under this section shall receive compensation in an amount as provided by this subdivision. For permanent partial disability up to the percent of the whole body shown in the following schedule the amount shall be equal to the proportion that the loss of function of the disabled part bears to the whole body multiplied by the amount aligned with that percent in the following schedule:

Percent of disability	Amount
0-25	$ 75,000
26-30	80,000
31-35	85,000
36-40	90,000
41-45	95,000
46-50	100,000
51-55	120,000
56-60	140,000
61-65	160,000
66-70	180,000
71-75	200,000
76-80	240,000
81-85	280,000
86-90	320,000
91-95	360,000
96-100	400,000

For all cases under this subdivision the percentage loss of function of a part of the body is determined according to the rules adopted by the commissioner pursuant to section 176.105, subdivision 4. This subdivision shall apply to a permanent partial disability incurred on or after the adoption of those rules.

Subd. 3c. [MAXIMUM PAYABLE.] The maximum amount payable under subdivisions 3a and 3b is the maximum compensation payable to an employee who has a 100 percent disability to the body as a whole and under no conditions shall an employee receive more that those amounts even if the employee sustains a disability to two or more body parts.

Subd. 3d. [GENERAL.] An employee who has incurred a personal injury shall receive temporary total compensation until these benefits are no longer payable pursuant to this section. If the injury results in a permanent partial disability the employee shall receive compensation as provided in this section.

Subd. 3e. [END OF TEMPORARY TOTAL COMPENSATION.] (a) 90 days after an employee has reached maximum medical improvement or 90 days after the end of an approved

retraining program, whichever is later, the employee's temporary total compensation shall cease. This cessation shall occur at an earlier date if otherwise provided by this chapter.

(b) If during the 90-day period described in clause (a) the employee retires or the employer furnishes work to the employee that is consistent with an approved plan of rehabilitation or, if no plan has been approved, that the employee can do in his or her physical condition and that job produces an economic status as close as possible to that the employee would have enjoyed without the disability, or the employer procures this employment with another employer or the employee accepts this job with another employer, temporary total compensation shall cease and the employee shall, if appropriate, receive impairment compensation pursuant to subdivision 3b. This impairment compensation is in lieu of economic recovery compensation under subdivision 3a, and the employee shall not receive both economic recovery compensation and impairment compensation. Temporary total compensation and impairment compensation shall not be paid concurrently. Once temporary total compensation ceases no further temporary total compensation is payable except as specifically provided by this section.

Upon receipt of a written medical report indicating that the employee has reached maximum medical improvement, the employer or insurer shall serve a copy of the report upon the employee and shall file a copy with the division. The beginning of the 90-day period shall commence on the day this report is served on the employee for the purpose of determining whether a job offer consistent with the requirements of this subdivision is made.

(c) The job which is offered or procured by the employer or accepted by the employee under clause (b) does not necessarily have to commence immediately but shall commence within a reasonable period after the end of the 90-day period described in clause (a). Temporary total compensation shall not cease under this subdivision until the job commences.

(d) If the job offered under clause (a) is not the job the employee had at the time of injury it shall be offered in writing

and shall state the nature of the job, the rate of pay, the physical requirements of the job, and any other information necessary to fully and completely inform the employee of the job duties and responsibilities.

The employee has 14 calendar days to accept or reject the job offer. If the employee does not respond within this period it is deemed a refusal of the offer.

(e) Self-employment may be an appropriate job under this subdivision.

The commissioner shall monitor application of this subdivision and may adopt rules to assure its proper application.

Subd. 3f. [JOB PRIOR TO MAXIMUM MEDICAL IMPROVEMENT.] If the employer offers a job prior to the employee reaching maximum medical improvement and the job is consistent with an approved plan of rehabilitation or if no rehabilitation plan has been approved and the job is within the employee's physical limitations; or the employer procures a job for the employee with another employer which meets the requirements of this subdivision; or the employee accepts a job with another employer which meets the requirements of this subdivision, the employee's temporary total compensation shall cease. In this case the employee shall receive impairment compensation for the permanent partial disability which is ascertainable at that time. This impairment compensation shall be paid at the same rate that temporary total compensation was last paid. Upon reaching maximum medical improvement the provisions of subdivisions 3e or 3p apply, whichever is appropriate, and economic recovery compensation or impairment compensation is payable accordingly except that the compensation shall be offset by impairment compensation received under this subdivision.

Subd. 3g. [ACCEPTANCE OF JOB OFFER.] If the employee accepts a job offer described in subdivision 3e and the employee begins work at that job, although not necessarily within the 90-day period specified in that subdivision, the impairment compensation shall be paid in a lump sum 30 calendar days after the employee actually commences work.

Subd. 3h. [TEMPORARY PARTIAL COMPENSATION.] An employee who accepts a job under subdivision 3e or subdivision 3f and begins that job shall receive temporary partial compensation pursuant to subdivision 2, if appropriate.

Subd. 3i. [LAY OFF BECAUSE OF LACK OF WORK OR RELEASED FOR OTHER THAN SEASONAL CONDITIONS.] (a) If an employee accepts a job under subdivision 3e and begins work at that job and is subsequently unemployed because of economic conditions, other than seasonal conditions, the employee shall receive monitoring period compensation pursuant to clause (b). In addition, the employer who was the employer at the time of the injury shall provide rehabilitation consultation by a qualified rehabilitation consultant if the employee remains unemployed for 45 calendar days. The commissioner may waive this rehabilitation consultation if the commissioner deems it appropriate. Further rehabilitation, if deemed appropriate, is governed by section 176.102.

(b) Upon the employee's initial return to work the monitoring period begins to run. If the employee is unemployed for the reason in clause (a), prior to the end of the monitoring period the employee shall receive monitoring period compensaton. This compensation shall be paid for the lesser of (1) the weeks remaining in the monitoring period, or (2) the weeks equal to the monitoring period minus the impairment compensation paid to the employee. For purposes of this clause the impairment compensation shall be converted to weeks by dividing the impairment compensation received by the employee by the employee's compensation rate for temporary total disability at the time of the injury. No monitoring period compensation is payable if the unemployment occurs after the expiration of the monitoring period. Monitoring period compensation is payable at the same intervals and in the same amount as when temporary total compensation ceased.

(c) If the employee returns to work and is still receiving monitoring period compensation, this compensation shall cease. Any period remaining in the monitoring period upon this return to work shall be used to determine further benefits if the

employee is again unemployed under clause (a).

(d) Upon the employee's return to work pursuant to this section the insurer shall notify the employee of the length of the employee's monitoring period and shall notify the employee of the amount of impairment to be paid and the date of payment.

Subd. 3j. [MEDICALLY UNABLE TO CONTINUE WORK.] (a) If the employee has started the job offered under subdivision 3e and is medically unable to continue at that job because of the permanent partial disability, that employee shall receive temporary total compensation pursuant to clause (b). In addition, the employer who was the employer at the time of the injury shall provide rehabilitation consultation by a qualified rehabilitation consultant. Further rehabilitation, if deemed appropriate, is governed by section 176.102.

(b) Temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later. The temporary total compensation shall cease at any time within the 90-day period that the employee begins work meeting the requirements of subdivision 3e. If no job is offered to the employee by the end of this 90-day period, the employee shall receive economic recovery compensation pursuant to this section but reduced by the impairment compensation previously received by the employee for the same disability.

Subd. 3k. [UNEMPLOYMENT DUE TO SEASONAL CONDITION.] If an employee has started the job offered under subdivision 3e and is subsequently unemployed from that job because of the job's seasonal nature, the employee shall receive any unemployment compensation the employee is eligible for pursuant to chapter 268. The employee shall receive, in addition and concurrently, the amount that the employee was receiving for temporary partial disability at the time of the lay off. No further or additional compensation is payable under this chapter because of the seasonal lay off.

Subd. 31. [FAILURE TO ACCEPT JOB OFFER.] If the employee has been offered a job under subdivision 3e and has

refused the offer, the impairment compensation shall not be paid in a lump sum but shall be paid in the same interval and amount that temporary total compensation was initially paid. Temporary total compensation shall cease upon the employee's refusal to accept the job offered and no further or additional temporary total compensation is payable for that injury. The payment of the periodic impairment compensation shall cease when the amount the employee is eligible to receive under subdivision 3b is reached, after which time the employee shall not receive additional impairment compensation or any other compensation under this chapter unless the employee has a greater permanent partial disability than already compensated for.

Subd. 3m. [RETURN TO WORK AFTER REFUSAL OF JOB OFFER.] If the employee has refused the job offer under subdivision 3e and is receiving periodic impairment compensation and returns to work at another job, the employee shall receive the remaining impairment compensation due, in a lump sum, 30 days after return to work.

Subd. 3n. [NO TEMPORARY PARTIAL COMPENSATION OR REHABILITATION IF JOB OFFER REFUSED.] An employee who has been offered a job under subdivision 3e and has refused that offer and who subsequently returns to work shall not receive temporary partial compensation pursuant to subdivision 2 if the job the employee returns to provides a wage less than the wage at the time of the injury. No rehabilitation shall be provided to this employee.

Subd. 3o. [INABILITY TO RETURN TO WORK.] (a) An employee who is permanently totally disabled pursuant to subdivision 5 shall receive impairment compensation as determined pursuant to subdivision 3b. This compensation is payable in addition to permanent total compensation pursuant to subdivision 4 and is payable concurrently. In this case the impairment compensation shall be paid in the same intervals and amount as the permanent total compensation is paid, and the impairment compensation shall cease when the amount due under subdivision 3b is reached. If this employee returns to work at any job during the period the impairment compensation is being paid,

the remaining impairment compensation due shall be paid in a lump sum 30 days after the employee has returned to work and no further temporary total compensation shall be paid.

(b) If an employee is receiving periodic economic recovery compensation and is determined to be permanently totally disabled no offset shall be taken against future permanent total compensation for the compensation paid. No further economic recovery compensation is payable even if the amount due the employee pursuant to subdivision 3a has not yet been reached.

(c) An employee who has received periodic economic recovery compensation and who meets the criteria under clause (b) of this subdivision shall receive impairment compensation pursuant to clause (a) of this subdivision even if the employee has previously received economic recovery compensation for that disability.

(d) Rehabilitation consultation pursuant to section 176.102 shall be provided to an employee who is permanently totally disabled.

Subd. 3p. [NO JOB OFFER.] Where the employee has a permanent partial disability and has reached maximum medical improvement or upon completion of an approved retraining program, whichever is later, that employee shall receive economic recovery compensation pursuant to subdivision 3a if no job offer meeting the criteria of the job in subdivision 3e is made within 90 days after reaching maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later.

Temporary total compensation shall cease upon commencement of the payment of economic recovery compensation. Temporary total compensation shall not be paid concurrently with economic recovery compensation.

Subd. 3q. [METHOD OF PAYMENT OF ECONOMIC RECOVERY COMPENSATION.] (a) Economic recovery compensation is payable at the same intervals and in the same amount as temporary total compensation was paid. If the employee returns to work and the economic recovery compensation is still being paid, the remaining economic recovery com-

pensation due shall be paid in a lump sum 30 days after the employee has returned to work.

(b) Periodic economic recovery compensation paid to the employee shall not be adjusted pursuant to section 176.645.

Subd. 3r. [PAYMENT OF COMPENSATION AT DEATH.] If an employee receiving economic recovery compensation or impairment compensation in periodic amounts dies during the period from causes unrelated to the injury, the compensation shall be paid in the following manner:

(a) If the deceased employee leaves a dependent surviving spouse and no dependent children, as defined by section 176.111, subdivision 1, the spouse shall receive the periodic economic recovery or impairment compensation that the deceased was receiving before the death. This compensation shall be paid for a period of up to ten years after the date of death at which time payments and future entitlement to it ceases.

(b) If the deceased employee leaves a dependent spouse and dependent children, as defined in section 176.111, subdivision 1, the periodic economic recovery or impairment compensation shall continue to be paid to the surviving spouse for up to ten years after the last child is no longer dependent after which time payments and future entitlement to the compensation ceases.

(c) Payment of compensation under this subdivision shall cease prior to the end of the ten-year periods in this subdivision if the amount to which the employee is entitled to receive under subdivision 3, 3a, or 3b, is reached prior to the end of the ten-year period. If the deceased employee is not survived by dependent children or a dependent spouse as defined in section 176.111, no further economic recovery compensation or impairment compensation is payable to any person under this subdivision.

(d) If the death results from the injury, the payment of economic recovery compensation or impairment compensation shall cease upon the death and death benefits are payable pursuant to section 176.111.

Subd. 3s. [ADDITIONAL ECONOMIC RECOVERY COMPENSATION OR IMPAIRMENT COMPENSATION.] No additional economic recovery compensation or impairment compensation is payable to an employee who has received that compensation to which the employee is entitled pursuant to subdivision 3a or 3b unless the employee has a greater permanent partial disability than already compensated.

Subd. 3t. [MINIMUM ECONOMIC RECOVERY COMPENSATION.] (a) Economic recovery compensation pursuant to this section shall be at least 120 percent of the impairment compensation the employee would receive if that compensation were payable to the employee. The monitoring period shall be at least 120 percent of the weeks during which impairment compensation would be payable if paid weekly.

(b) An employee who has suffered a personal injury for which temporary total compensation is payable but which produces no permanent partial disability shall receive 26 weeks of economic recovery compensation if no job is offered within the time specified in and meeting the criteria of subdivision 3e.

Subd. 3u. [MEDICAL BENEFITS.] This section does not in any way limit the medical benefits to which an injured employee is otherwise entitled pursuant to this chapter.

Subd. 3v. [ADMINISTRATIVE CONFERENCE.] The provisions of section 176.242 apply if there exists a dispute regarding maximum medical improvement or whether the job offered meets the criteria under subdivision 3e or 3f.

Subd. 4 [PERMANENT TOTAL DISABILITY.] For permanent total disability, as defined in subdivision 5, the compensation shall be 66-2/3 percent of the daily wage at the time of the injury, subject to a maximum weekly compensation equal to the maximum weekly compensation for a temporary total disability and a minimum weekly compensation equal to the minimum weekly compensation for a temporary total disability. This compensation shall be paid during the permanent total disability of the injured employee but after a total of $25,000 of weekly compensation had been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the

amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision. This reduction shall also apply to any old age and survivor insurance benefits. Payments shall be made at the intervals when the wage was payable, as nearly as may be. In case an employee who is permanently and totally disabled becomes an inmate of a public institution, no compensation shall be payable during the period of confinement in the institution, unless he has wholly dependent on him for support some person named in section 176.111, subdivisions 1, 2 or 3, in which case the compensation provided for in section 176.111, during the period of confinement, shall be paid for the benefit of the dependent person during dependency. The dependency of this person shall be determined as though the employee was deceased.

Subd. 4a. [PREEXISTING CONDITION OR DISABILITY; APPORTIONMENT.] (a) If a personal injury results in a disability which is attributable in part to a preexisting disability that arises from a congenital condition or is the result of a traumatic injury or incident, whether or not compensable under this chapter, the compensation payable for the permanent partial disability pursuant to this section shall be reduced by the proportion of the disability which is attributable only to the preexisting disability. An apportionment of a permanent partial disability under this subdivision shall be made only if the preexisting disability is clearly evidenced in a medical report or record made prior to the current personal injury. Evidence of a copy of the medical report or record upon which apportionment is based shall be made available to the employee by the employer at the time compensation for the permanent partial disability is begun.

(b) The compensable portion of the permanent partial disability under this section shall be paid at the rate at which the entire disability would be compensated but for the apportionment.

Subd. 5. [TOTAL DISABILITY.] The total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties, or any other injury which totally incapacitates the employee from working at an occupation which brings him an income constitutes total disability.

Subd. 6. [MINORS.] If any employee entitled to the benefits of this chapter is a minor or is an apprentice of any age and sustains a personal injury arising out of and in the course of employment resulting in permanent total or a compensable permanent partial disability, for the purpose of computing the compensation to which the employee is entitled for the injury the compensation rate for temporary total, temporary partial, a permanent total disability or economic recovery compensation shall be the statewide average weekly wage.

Subd. 8. [RETIREMENT PRESUMPTION.] For injuries occurring after the effective date of this subdivision an employee who receives social security old age and survivors insurance retirement benefits is presumed retired from the labor market. This presumption is rebuttable by a preponderance of the evidence.

Minn. Stat. § 176.101, Subd. 1, 2, 3d, 3e (1983):

176.101 COMPENSATION SCHEDULE.

Subdivision 1. **Temporary total disability.** For injury producing temporary total disability, the compensation is 66-2/3 percent of the weekly wage at the time of injury

(1) provided that during the year commencing on October 1, 1979, and each year thereafter, commencing on October 1, the maximum weekly compensation payable is the statewide average weekly wage for the period ending December 31, of the preceding year.

(2) The minimum weekly compensation benefits for temporary total disability shall be not less than 50 percent of the statewide average weekly wage or the injured employee's actual weekly wage, whichever is less. In no case shall a weekly benefit be less than 20 percent of the statewide average weekly wage.

Subject to subdivisions 3a to 3u this compensation shall be paid during the period of disability, payment to be made at the intervals when the wage was payable, as nearly as may be.

Subd. 2. **Temporary partial disability.** In all cases of temporary partial disability the compensation shall be 66-2/3 percent of the difference between the weekly wage of the employee at the time of injury and the wage the employee is able to earn in the employee's partially disabled condition. This compensation shall be paid during the period of disability except as provided in section 176.101, payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to a maximum compensation equal to the statewide average weekly wage.

* * * * *

Subd. 3d. **General.** An employee who has incurred a personal injury shall receive temporary total compensation until these

benefits are no longer payable pursuant to this section. If the injury results in a permanent partial disability the employee shall receive compensation as provided in this section.

Subd. 3e. **End of temporary total compensation.** (a) 90 days after an employee has reached maximum medical improvement or 90 days after the end of an approved retraining program, whichever is later, the employee's temporary total compensation shall cease. This cessation shall occur at an earlier date if otherwise provided by this chapter.

(b) If during the 90-day period described in clause (a) the employee retires or the employer furnishes work to the employee that is consistent with an approved plan of rehabilitation or, if no plan has been approved, that the employee can do in his or her physical condition and that job produces an economic status as close as possible to that the employee would have enjoyed without the disability, or the employer procures this employment with another employer or the employee accepts this job with another employer, temporary total compensation shall cease and the employee shall, if appropriate, receive impairment compensation pursuant to subdivision 3b. This impairment compensation is in lieu of economic recovery compensation under subdivision 3a, and the employee shall not receive both economic recovery compensation and impairment compensation. Temporary total compensation and impairment compensation shall not be paid concurrently. Once temporary total compensation ceases no further temporary total compensation is payable except as specifically provided by this section.

Upon receipt of a written medical report indicating that the employee has reached maximum medical improvement, the employer or insurer shall serve a copy of the report upon the employee and shall file a copy with the division. The beginning of the 90-day period shall commence on the day this report is served on the employee for the purpose of determining whether a job offer consistent with the requirements of this subdivision is made.

(c) The job which is offered or procured by the employer or accepted by the employee under clause (b) does not necessarily have to commence immediately but shall commence within a reasonable period after the end of the 90-day period described in clause (a). Temporary total compensation shall not cease under this subdivision until the job commences.

(d) If the job offered under clause (a) is not the job the employee had at the time of injury it shall be offered in writing and shall state the nature of the job, the rate of pay, the physical requirements of the job, and any other information necessary to fully and completely inform the employee of the job duties and responsibilities.

The employee has 14 calendar days to accept or reject the job offer. If the employee does not respond within this period it is deemed a refusal of the offer.

(e) Self-employment may be an appropriate job under this subdivision. The commissioner shall monitor application of this subdivision and may adopt rules to assure its proper application.

BEST AVAI

Minn. Stat. § 176.101, Subds. 1, 2 (1981) [No changes were made in this section in the 1982 statute]:

176.101 [COMPENSATION SCHEDULE.]

Subdivision 1. [TEMPORARY TOTAL DISABILITY.] For injury producing temporary total disability, 66 2/3 percent of the daily wage at the time of injury

(1) provided that during the year commencing on October 1, 1979, and each year thereafter, commencing on October 1, the maximum weekly benefits payable shall be the statewide average weekly wage for the period ending December 31, of the preceding year.

(2) The minimum weekly compensation benefits for temporary total disability shall be not less than 50 percent of the statewide average weekly wage or the injured employee's actual weekly wage, whichever is less. In no case shall a weekly benefit be less than 20 percent of the statewide average weekly wage.

This compensation shall be paid during the period of disability, payment to be made at the intervals when the wage was payable, as nearly as may be.

Subd. 2. [TEMPORARY PARTIAL DISABILITY.] In all cases of temporary partial disability the compensation shall be 66 2/3 percent of the difference between the daily wage of the worker at the time of injury and the wage he is able to earn in his partially disabled condition. This compensation shall be paid during the period of disability, payment to be made at the intervals when the wage was payable, as nearly as may be, and subject to a maximum compensation equal to the statewide average weekly wage. If the employer does not furnish the worker with work which he can do in his temporary partially disabled condition and he is unable to procure such work with another employer, after reasonably diligent effort, the employee shall be paid at the full compensation rate for his or her temporary total disability.

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Supreme Court, U.S.
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CLERK

No. 87-1035

In The

Supreme Court of the United States

October Term, 1987

JAMES P. JOYCE, JR.,

Petitioner,

vs.

LEWIS BOLT & NUT COMPANY,
SELF INSURED,
and
LEWIS BOLT & NUT COMPANY AND
GREAT AMERICAN INSURANCE COMPANY,
and
HMO MINNESOTA AND
NORTH AMERICAN ASSURANCE COMPANY,
and
THE SPECIAL COMPENSATION FUND,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 412 N.W.2d 304 (1987) and is reprinted in Appellant's Appendix. The Workers' Compensation Court of Appeals' decision is reported at 39 W.C.D 148 (1986) and is reprinted in Appellant's Appendix. The Findings and Order of the Compensation Judge, Office of Administrative Hearings, served and filed September 30, 1985, not reported is reprinted in Appellant's Appendix.

JURISDICTION

Judgment of the Minnesota Supreme Court was entered on September 18, 1987. Appellant seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257 (2).

CONSTITUTIONAL PROVISIONS AND RULES

United States Constitution, Amendment XIV, 8)§1 is set forth in Appellant's Appendix.

STATUTES INVOLVED

Minn. Stat. §176.101 (1984); Minn. Stat. §176.101, Subds. 1, 2 (1983); Minn. Stat. §176.101, Subds. 1, 2 (1981-82).

The relevant sections of these Statutes are set forth in Appellant's Appendix.

MOTION

The appellee, Lewis Bolt & Nut, self-insured, in the above-entitled case, moves to dismiss the appeal on the following grounds:

1. The federal question sought to be reviewed was not timely nor properly raised nor expressly passed on by the courts of Minnesota.
2. The appeal does not present a substantial federal question.

STATEMENT OF THE CASE

The appellant, James Joyce, Jr., filed a Claim Petition seeking workers' compensation benefits for six injuries. Five of these injuries occurred prior to 1984. Following each of these five injuries, the employee was able to return to work. On June 15, 1984, Mr. Joyce sustained a sixth injury precluding him from returning to work. This sixth injury occurred after the Minnesota Workers' Compensation Act had undergone changes which became effective January 1, 1984.

A hearing on the Claim Petition took place on July 23 and 24, 1985 before Compensation Judge Bernard Dinner. The Compensation Judge found Mr. Joyce had reached maximum

medical improvement on January 31, 1985, and pursuant to Minn. Stat. §176.101, subd 3e (1984), temporary total disability benefits ended 90 days following maximum medical improvement.

On October 16, 1985, Mr. Joyce appealed the decision of the Compensation Judge to the Minnesota Workers' Compensation Court of Appeals. On November 18, 1986, the decision of the Minnesota Workers' Compensation Court of Appeals was served and filed. This court found that temporary total disability benefits were payable beyond 90 days after reaching maximum medical improvement and ordered that these benefits be paid by Lewis Bolt & Nut and Great American Insurance Company, the employer and insurer at the time of the June 15, 1984, injury.

The Minnesota Supreme Court reviewed on certiorari the decision of the Minnesota Workers' Compensation Court of Appeals, and filed its opinion on September 18, 1987. In reversing the decision of the Minnesota Workers' Compensation Court of Appeals, the Minnesota Supreme Court reinstated the Compensation Judge's decision limiting temporary total disability compensation to the period ending 90 days after the employee reached maximum medical improvement.

Appellant, for the first time, now argues that a federal question arose when the Minnesota Supreme Court rendered a unanimous decision containing an unexpected interpretation of the Minnesota Workers' Compensation Act of 1984.

QUESTIONS PRESENTED

1. Can Appellant raise a federal question on appeal for the first time to the United States Supreme Court when this question was not raised, presented nor pursued in a timely manner before the Courts of the State of Minnesota?
2. Does this appeal present a substantial federal question?

ARGUMENT

I. APPELLANT'S HAVE FAILED TO RAISE A FEDERAL QUESTION IN A TIMELY MANNER.

Appellant's jurisdictional statement raises a federal question that was not raised, presented or pursued in the Courts of Minnesota.

Appellant invokes jurisdiction of this Court by 28 U.S.C. §1257 (2) which provides:

> Final judgements or decrees rendered by the highest court in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ... (2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of its validity.

Appellant admits that the question presently being raised is a question that was not raised or decided by the Minnesota Supreme Court. A plain reading of 28 U.S.C. §1257 (2) results in a finding of no jurisdiction since the Minnesota Supreme Court made no decision "in favor of" the validity of the Minnesota Workers' Compensation Act.

The general jurisdiction rule is that the Federal question must be raised, presented and pursued in a timely manner in the state court proceedings. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962). The general rule will not be applied where the grounds for the decision form a new and unexpected basis for a claim based on the denial of a federal right. *Great Northern Railway Co. v. Sunburst Oil & Refinery Co.,* 287 U.S. 358, 366-67 (1932); *Herndon v. Georgia,* 295 U.S. 441 (1935). This exception to the general rule of jurisdiction does not apply to this case, since the Minnesota Supreme Court ruling should have been anticipated by appellant.

The rights of an employee are fixed at the time of his compensable accident. *Schwartz v. Talmo,* 295 Minn. 356, ____, 205 N.W.2d 318, 321 (1973). With respect to Mr. Joyce's June 15,

1984, work accident and resulting claim for temporary total disability, Minn. Stat. §176.101, subd. 3e (1984) provides that such benefits will be terminated 90 days after a finding that the employee has reached maximum medical improvement. Given the plain reading of the statute, one could easily anticipate that 90 days following maximum medical improvement the employee's entitlement to temporary total disability benefits would cease.

The Compensation Judge determined that Mr. Joyce's entitlement to temporary total disability benefits ceased 90 days after reaching maximum medical improvement. The Minnesota Supreme Court reached the same conclusion, which appellant now claims is unconstitutional. Not only could appellant have anticipated the Minnesota Supreme Court's decision, it was, in fact, the same decision reached by the lowest court.

A constitutional challenge to Minn. Stat. §176.101, subd. 3e (1984) was never raised, presented or pursued by appellant at either the Minnesota Workers' Compensation Court of Appeals or the Minnesota Supreme Court despite the Compensation Judge's decision. Based on a plain reading of the Minnesota Workers' Compensation Act and/or the ruling of the Compensation Judge, the appellant should have anticipated that the Minnesota Supreme Court would reinstate the Compensation Judge's decision. Appellant had a duty to raise the federal question at the first opportunity after these constitutional rights allegedly were invaded by the Compensation Judge's decision. *Herndon, supra.*

To raise the federal question on appeal to the United States Supreme Court, at this time, is untimely and this appeal should be dismissed.

II. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant's basic premise is that the decision of the Minnesota Supreme Court deprived him of rights guaranteed by the Fourteenth Amendment to the United States Constitution. The United States Supreme Court's analysis of alleged violations of

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is well-established. If a classification impinges upon a fundamental right guaranteed by the United States Constitution or the Bill of Rights, the classification must be necessary to serve a compelling governmental interest. Appellant admits that no fundamental rights are at stake here.

Essentially the same standard of review is mandated for legislation that discriminates against "discrete and insular minorities." *U.S. v. Carolene Products,* 304 U.S. 144, 152 n.4 (1939). This Court has identified only three such categories -race, see *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954); alienage, see *Graham v. Richardson,* 403 U.S. 605 (1971); and national origin, see *Korematsu v. United States,* 323 U.S. 47 (1944). Appellant makes no claim, nor does any evidence show that he is a member of any of these groups.

An intermediate standard of review is mandated for legislative classification based on gender, see *Craig v. Boren,* 329 U.S. 190 (1976); illegitimacy, see *Mills v. Habluetzel,* 456 U.S. 91 (1982); or discrimination against illegal alien children, see *Phyler v. Doe,* 457 U.S. 202 (1982). Neither the enactments of the Minnesota Legislature 1983, nor the Minnesota Supreme Court's decision in *Joyce v. Lewis Bolt & Nut Co.,* 412 N.W.2d 304 (Minn. 1987) is based, in any way, on categories giving rise to scrutiny under an immediate standard of equal protection analysis.

Legislation within the areas of economics and social welfare which results in some inequality does not violate the Federal Equal Protection Clause. *Dandridge v. Williams,* 397 U.S. 471, 485 (1971). "[W]hen social or economic legislation is at issue, the Equal Protection Clause allows states wide latitude, . . . and the Constitution presumes that even improvident decisions will be rectified by the democratic process." *City of Cleburn, Texas v. Cleburn Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249,3254 (1985).

Review of classifications under the Equal Protection Clause of the Fourteenth Amendment by the United States Supreme

is limited. A classification is presumed to be constitutionally valid, "and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest". Id. 473 U.S. at , 105 S.Ct. at 3255. Essentially, equal protection analysis by the United States Supreme Court uses a two-part test: (1) Does the classification have a legitimate purpose? (2) Could legislators reasonably have believed the classification would promote this purpose? *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 668 (1981).

It is clear, as appellant acknowledges, that the legislation enacted by the Minnesota Legislature meets this Equal Protection Challenge. Appellant's argument is that the Minnesota Supreme Court's decision unconstitutionally extends the provisions of the 1984 legislation to encompass injuries sustained before January 1, 1984. The Minnesota Supreme Court held that appellant's right to temporary total disability benefits did not vest prior to June 15, 1984, because he was not totally disabled until June 15, 1984. The fact that the prior injuries contributed to the quantum of disability he suffered after June 1984 was not proved until after that injury. *Joyce,* 412 N.W.2d at 308. As the Minnesota Supreme Court points out, "most often the occurrence of a compensable injury is the [event which controls the employee's right to benefits.]" Id. at 307.

Appellant was able to work until June 15, 1984, when he sustained his sixth work-related injury. The law in effect on the date of the last injury controls appellant's entitlement to, and the amount of, benefits under Minnesota Workers' Compensation Law. Some employees will benefit from this rule of law, and some, like appellant, will not. The key question, however, is whether the Minnesota Supreme Court's classification has a legitimate purpose. The Minnesota Supreme Court used this case to clarify and make certain that the law in effect on the date of an employee's final compensable injury controls the employee's entitlement to workers' compensation benefits. Bringing certainty to an unsettled area of the law is a legitimate and proper role of a state supreme court. This decision

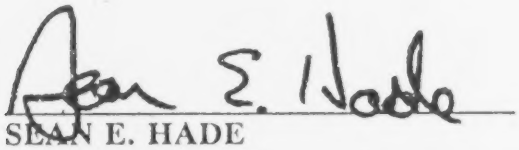
promoted that objective.

Thus, appellant's entitlement to benefits is controlled by the "new" workers' compensation law. This does not deny appellant equal protection under the laws. The Minnesota Supreme Court followed past precedents to reach the conclusion that the law in effect at the time of the employee's last compensable injury governs the employee's entitlement to, and the amount of, workers' compensation benefits. The challenged classification was not created by the Minnesota Supreme Court's decision in *Joyce,* but *Joyce* reaffirmed previous decisions of the Minnesota Supreme Court. See *Schwartz v. Talmo,* 295 Minn. 356, 205 N.W.2d 318 (1973). The challenged decision of the Minnesota Supreme Court furthers the purpose of clarifying a basic tenet of workers' compensation law — the law in effect at the time of the last compensable personal injury controls the employee's entitlement to, and amount of, worker's compensation benefits.

CONCLUSION

For these reasons, this Court should dismiss the appeal, and affirm the decision of the Minnesota Supreme Court.

Respectfully submitted,



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and

LEWIS BOLT & NUT COMPANY AND
GREAT AMERICAN INSURANCE COMPANY,

and

HMO MINNESOTA, and
NORTH AMERICAN LIFE ASSURANCE COMPANY,

and

THE SPECIAL COMPENSATION FUND,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

Motion To Dismiss Or Affirm

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and

THE SPECIAL COMPENSATION FUND,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

The appellee, Lewis Bolt & Nut Company and Great American Insurance Company moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Minnesota on the grounds (1) the appeal does not present a substantial fed-

eral question and (2) it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATE STATUTE INVOLVED

The appeal raises the question of whether the Workers' Compensation Statute for the State of Minnesota, M.S. §176.101, Subd. 3 (pre-1984) or Subd. 3e (post-1983) may be amended to limit the amount of time for which temporary total disability is paid for injuries which occur after the statutory change.

For injuries and disability occurring prior to January 1, 1984, there was no time limit for temporary total disability payments. In 1983, the Minnesota Legislature provided that for injuries occurring after December 31, 1983, temporary total disability payments would only be payable up to 90 days after "maximum medical improvement."

The appeal contends such a change violates the equal protection clause of the United States Constitution.

ADDITIONAL STATEMENT OF FACTS

The appellant sustained five work-related injuries prior to January 1, 1984, two of which resulted in permanent disability.

The Minnesota Supreme Court significantly pointed out,

> "The employee had, however, returned to work after the October 1983 [fifth] injury, and until the injury of June 15, 1984, the employee was not totally disabled." (p. B-7, Appellant's Jurisdictional Statement.)

Injury number six, that of June 15, 1984 (which obviously occurred after the statutory change) caused the new disability:

> "On the occurrence of the separate new injury the rights available under the statute in effect on June 15, 1984, superseded those still contingent rights provided by the 'old' statute." (Minnesota Supreme Court Decision at B-7, Jurisdictional Statement.)

Appellant's "Statement of the Case" at Page 6 misconstrues the factual situation: in order to obtain temporary total disability, an employee must (1) sustain a "personal injury," and (2) sustain *disability*. The *disability* in the instant case did not occur until caused by the 1984 injury. Any potential for such benefits prior to the June 15, 1984 incident was a "contingency" based on the existence or nonexistence of "disability" as indicated by the Minnesota Supreme Court.

ARGUMENT

The case fails to present a substantial federal question and it is manifest that the questions presented are so unsubstantial as to not need further argument.

Appellant, in his argument, fails to recognize two separate legal entities — *Injury*, and *Disability*. He suggests (p. 7, Jurisdictional Statement)

> "If [an employee] was injured in 1981 . . . he would be entitled to ongoing temporary total benefits indefinitely."

Not so. He must also have ongoing *disability* in order to obtain such benefits. And in the instant case his *disability*

had ceased and was begun/caused by the new injury under the new statute. Such disability is subject to the law applicable to the new injury.

Counsel suggests

> "If appellant had only been injured the first five times, all pre-1984 injuries, he would have been entitled to benefits as prescribed by the law in effect on the date of each of the five injuries" (p. 7, Jurisdictional Statement).

True. But absent the June 15, 1984, injury, the employee would have thereafter still been working and therefore receiving no benefits at all.

The contractual aspect of the case is raised at p. 8 of the Jurisdictional Statement. This is clearly met and answered by the Minnesota Supreme Court discussion at p. B-5-6:

The Workers' Compensation Acts are, of course, some of the earliest examples of modern social legislation. By law, workers' in the early 1900's were forced to give up their right to sue an employer under Common Law in return for the legislative-controlled benefits. As the Minnesota Supreme Court said,

> "[T]he rights and liabilities created by the Workers' Compensation Act are imposed on the employer relationship pursuant to the police power, independently of any actual or implied contract [citing case] [but with the theory] that the statute becomes a part of the contract of employment [citing case]" (p. B-5 Jurisdictional Statement).

In discussing the contract clause of the United States Constitution (Article I §10), Justice Blackmun recently held

> "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.' Home Bldg. & Loan Assn. v. Blaisdell, 290 US 398, 434, 78 L Ed 413, 54 S Ct 231 (1934). In Blaisdell, the Court approved a Minnesota mortgage moratorium statute, even though the statute retroactively impaired contract rights. The Court balanced the language of the Contract Clause against the State's interest in exercising its police power, and concluded that the statute was justified" (*Energy Reserved v. Kansas P & L*, 549 U.S. 400, 103 S. Ct. 697, 76 O.G.R. 393, 74 L.Ed. 2d 569 (1983).

The Minnesota Supreme Court in the instant case went on to say that the "controlling event" as far as the contractual phase of the law is concerned, is the new injury (if it is, as here, a permanent substantial cause of the disability):

> "If . . . the employee suffers a new, separate injury, that new injury supersedes the earlier injury as the controlling event, and the law in effect on the date of the new injury supersedes the law in effect at the time of the earlier injury" [citing Professor Larson's National Treatise and another Minnesota case] (p. B-6, Jurisdictional Statement).
>
> "While it is true that employee had a right after the work-related injury of October 16, 1983, to benefits during temporary total disability substantially caused by his October of 1983 injury and any earlier work-related injuries, the right was contingent on employee

being temporarily totally disabled and did not vest until the causal relationship between his disability and the prior work-related injuries had been proved" (Minnesota Supreme Court Decision at p. B-6-7 of Jurisdictional Statement).

Long ago, our Federal Supreme Court said the constitutional guarantee against the impairment of contracts refers to

> ". . . a valid subsisting obligation, not a contingent or speculative one" (*Ochiltree v. Iowa R. Contracting Company*, 21 Wall. 249, 22 L.Ed. 546 (1875)).

Mr. Justice Holmes said in *Sperry & Hutchinson v. Rhodes*, 220 U.S. 502, 31 S. Ct. 490, 55 L.Ed. 561 (1911) at p. 563 of 22 L.Ed.

> "But the 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."

More recently, our Federal Supreme Court has often repeated

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions" *Memoirs v. Massachusetts*, 383 U.S. 413 at 462, 16 L.Ed. 2d 1 (1966); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L.Ed. 2d 446 (1983).

In the instant case, the Minnesota Legislature has changed the amount of benefits due as a result of a post-1983 injury. All people injured before 1984 are subject

to the same benefits; all people injured after 1983 are also subject to the same benefits:

> "The equal protection of the laws . . . means subjection to equal laws applying alike to all in the same situation . . ." (*South Carolina ex rel Phoenix Mutual v. McMaster*, 237 U.S. 63, 72, 35 S. Ct. 504, 59 L.Ed. 839 at p. 843 of 59 L.Ed. (1915)).

CONCLUSION

Wherefore, appellee respectfully submits that the question upon which this case depends is so unsubstantial as to not need further argument and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Minnesota.

Respectfully submitted,

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No. 87-1035

IN THE

Supreme Court of the United States

October Term, 1987

JAMES P. JOYCE, JR.,
Appellant,

vs.

LEWIS BOLT & NUT COMPANY,
SELF-INSURED,

and

LEWIS BOLT & NUT COMPANY AND
GREAT AMERICAN INSURANCE COMPANY,

and

HMO MINNESOTA, and
NORTH AMERICAN LIFE ASSURANCE COMPANY

and

THE SPECIAL COMPENSATION FUND,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Did the appellant raise, present and pursue the federal question in a timely and proper manner in the state court proceedings?

2. Did the Minnesota Supreme Court's determination that Minnesota law entitles an injured worker to receive workers' compensation benefits based on the law in effect at the time of injury violate the Equal Protection Clause, U.S. Const., amend. XIV § 1?

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Appellee, the Special Compensation Fund, pursuant to Rule 16 of the Supreme Court of the United States, moves to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported at 412 N.W.2d 304 (Minn. 1987) and reproduced in the Appendix to Jur. Stat. (B-1 to B-7).[1]

[1] Throughout this motion, the abbreviation "Jur. Stat." means the appellant's Jurisdictional Statement; the abbreviation "A—" is a reference to the Appendix to the Jurisdictional Statement.

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional and statutory provisions except for Minn. Stat. § 176.001 (1984) (State A-1)[2] are set forth by appellants. (Jur. Stat. 2; E-1 to E-13; F-1 to F-3; G-1).

STATEMENT OF THE CASE

This is an appeal from a decision of the Minnesota Supreme Court holding that the Minnesota Workers' Compensation Act in effect on the date of a new, separate injury supersedes the law in effect on the date of an employee's earlier injuries. (Jur. Stat. B-1 through B-7).

The law in effect on the date of the employee's last injury, Minn. Stat. § 176.101, subd. 3(e) (1984) provides that 90 days after the employee reaches maximum medical improvement, the employee's right to ongoing temporary total disability compensation ceases. (Jur. Stat. E-3 through E-5).

The law in effect on the dates of the employee's pre-1984 injuries provided that an employee was entitled to receive ongoing temporary total disability benefits for the entire period of the employee's disability. (Jur. Stat. G-1).

The employee sustained five separate work-related back injuries under the law in effect prior to the effective date of Minn. Stat. § 176.101, subd. 3(e) (1984). After each of these injuries, the employee was temporarily totally disabled for a period of time. After each of these periods of temporary total

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[2] Throughout this motion, the abbreviation "State A—" is a reference to the Appendix to this Motion to Dismiss of Appellee Special Compensation Fund.

disability, the employee returned to his former position and was no longer temporarily totally disabled. At the time the statute at issue became effective, the employee was working and was not temporarily totally disabled due to any of his pre-1984 injuries. Minn. Stat. § 176.101, subd. 3(e) (1984) became effective on February 13, 1984. On June 15, 1984, the employee sustained another work-related back injury which disabled him totally for a temporary period. In accordance with Minn. Stat. § 176.101, subd. 3(e) (1984), the Minnesota Supreme Court held that the employee's entitlement to temporary total disability benefits ceased on May 1, 1985, which was 90 days after the employee reached maximum medical improvement on January 31, 1985.

ARGUMENT

I. THE FEDERAL QUESTION WAS NOT RAISED, PRESENTED OR PURSUED IN A TIMELY OR PROPER MANNER IN THE STATE COURT PROCEEDINGS AND THEREFORE THIS APPEAL IS NOT PROPERLY BEFORE THIS COURT.

The federal question in this case is insubstantial and should not be considered by the Court because appellant failed to raise it in a timely manner before the Minnesota Supreme Court. *Beck v. Washington*, 369 U.S. 541, 549-54 (1962). Appellant's contention that there had been no question raised about the statute's constitutionality prior to its interpretation by the Minnesota Supreme Court is incorrect. The facts indicate that the Minnesota court's interpretation was neither new nor unexpected. First, the statute on its face clearly states that "90 days after an employee has reached maximum medical improvement or 90 days after the end of an approved retraining program, whichever is later, the employee's temporary total compensation shall cease." (Jur. Stat. E-3, 4). This language in and of itself raises the question which appellant seeks to have reviewed for the first time on appeal to this Court.

Second, the decision of the Minnesota court merely reinstates the decision of the workers' compensation judge. (Jur. Stat. B-7). Given the compensation judge's Findings, Order and Memorandum, the appellant cannot now argue that the Minnesota Supreme Court's interpretation was unexpected. The issues which are the basis for the federal question raised by this appeal were decided by the compensation judge and appellant did not raise, present or pursue them either at the Workers' Compensation Court of Appeals or the Minnesota Supreme Court.

II. THE DECISION OF THE MINNESOTA SUPREME COURT ALLOCATES BENEFITS ON A RATIONAL BASIS AND THEREFORE FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

Appellant argues that the decision below violates the Equal Protection Clause of the Fourteenth Amendment in that it treats a worker who sustains injuries both before and after the 1984 legislative changes different from workers whose injuries occur either before or after the 1984 legislative changes. This equal protection argument is plainly insubstantial. Appellant makes no claim that a "suspect class" is involved and concedes that no "fundamental right" is implicated. (Jur. Stat. at 8). Accordingly, the appropriate standard of review is the rational basis test. *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). That means the challenged "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). When social or economic legislation is at issue, states are afforded vast discretion. *Cleburne* at 440. Here, there is a legitimate government purpose of adjusting the levels of workers' compensation benefits and the classification of who receives the altered benefits is rationally based.

The purpose of the Minnesota Workers' Compensation Act is clearly articulated in the very first sentence of the Act. It states, in part, "[i]t is the intent of the legislature . . . to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . ." (State A-1). The Workers' Compensation Act has two co-existent goals: (1) to provide benefits to injured employees, and (2) to provide those benefits at a rea-

sonable cost to employers. At issue here is a reduction in the duration of benefits payable for temporary total disability. The Minnesota Legislature made the judgment that the purposes of the Act would be served better if those benefits were not available indefinitely as they had been prior to the 1984 amendment. Appellant does not argue that this reduction in the duration of benefits does not serve a legitimate state interest.

Having made the judgment that the period for which the benefits would be paid would be changed, it was necessary that a line be drawn between those who were eligible for the prior level of benefits and those who would receive the new level. It is this classification that appellant challenges. The state supreme court has drawn the line in a reasonable manner, consistent with the long-standing principles in the workers' compensation field that the law in effect on the date of the employee's compensable injury is the law which governs the employee's right to benefits as a result of that injury.

Thus, if the right to benefits arises purely from pre-1984 injuries, pre-1984 law and benefit levels apply. If the right to benefits is based on injuries that occurred in 1984 or later, the 1984 law applies. This is patently a rational classification.

Here, the compensable injury was the last injury, which occurred in June of 1984, after the effective date of the 1984 legislative changes. Accordingly, the changed benefit provisions were applied.

The fact that the employee had suffered prior injuries that contributed to the level of his disability after the 1984 injury does not make it irrational to apply the new law here. After each of the prior injuries and periods of disability, the employee recovered and returned to work. More importantly, he was not totally disabled due to the prior injuries at the time of

the 1984 injury. Therefore, at that time, he was not eligible for and was not receiving temporary total disability benefits based on the prior injuries. It was only because of the subsequent 1984 injury that appellant again became temporarily totally disabled. If not for the 1984 injury, the claim for benefits at issue here would not exist. Therefore, it was rational for the Minnesota court to decide that in such circumstances the appellant's benefits would be determined by the 1984 law, because that was the law in effect at the time of the injury that triggered the eligibility.

Moreover, the Minnesota Supreme Court ruling does not deprive the appellant of any "vested" right. It simply held that the 1984 injury is governed by the 1984 law. With respect to the pre-1984 injuries the court below held that the employee's right to ongoing benefits was "contingent on employee being temporarily totally disabled and did not vest until the causal relationship between his disability and the prior work-related injuries had been proved." (Jur. Stat. B-7). The Minnesota court found no such causal relationship because the employee was not totally disabled by the prior injuries at the time of the 1984 injury and the new injury in 1984 "superseded those still contingent rights provided by the 'old' statute". (Jur. Stat. B-7).

CONCLUSION

The Minnesota Supreme Court's application of the 1984 legislative changes to the Minnesota Workers' Compensation Act as stated do not violate the rational basis standard this Court traditionally applies to equal protection challenges in social welfare and economic matters. Because appellant's argument presents no substantial federal question, no further consideration by this Court is warranted, and this appeal should be dismissed.

Respectfully submitted,

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APPENDIX

A-1

176.001 INTENT OF THE LEGISLATURE.

It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.